164-701

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~131~~. 20

HENRY H. TUCKER, APPELLANT,

vs.

GORDON McKAY, TRUSTEE OF THE McKAY SEWING MACHINE ASSOCIATION.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JULY 23, 1892.

(15,089.)

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1 *Transcript of Record.*

UNITED STATES OF AMERICA, *District of Massachusetts,* } ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-one.

Before the Honorable Le Baron B. Colt, circuit judge.

GORDON MCKAY, Trustee, Complainant,
v.
HENRY H. TUCKER, Defendant. } No. 2200. Equity.

The bill of complaint in this cause was filed in the clerk's office on the tenth day of August, A. D. 1885, and was duly entered at the May term of this court, A. D. 1885, and is in the words and figures following:

2 *Bill of Complaint.*

(Filed August 10, 1885.)

To the honorable the judges of the circuit court of the United States for the district of Massachusetts:

Gordon McKay, of Newport, in the State of Rhode Island, and a citizen of said State, trustee for the McKay Sewing Machine Association, brings this, his bill, against Henry H. Tucker, of East Stoughton, in the State of Massachusetts, shoe manufacturer, sole surviving partner of the firm of E. Tucker & Son, formerly composed of Ebenezer Tucker, now deceased, and said Henry H. Tucker, and doing business in said East Stoughton under the firm name and style of E. Tucker & Son, a citizen of said State of Massachusetts.

1. And, thereupon, your orator complains and says that, prior to the fourteenth day of August, A. D. 1860, one Lyman R. Blake, a citizen of the State of Massachusetts, and of the United States, was the true, original, and first inventor of certain new and useful improvements in the manufacture of boots and shoes, not known or used before his invention thereof, and which, at the time of his application for letters patent, afterwards granted him therefor, as hereinafter set forth, had not been in public use or on sale with his consent and allowance for more than two years prior to said application; that said Blake, so being the sole and original inventor of said improvements, applied for letters patent of the United States therefor, according to law; and on said fourteenth day of August, A. D., 1860, letters patent of the United States, executed in due form of law, and numbered 29561, for his invention or discovery, were issued to the said Blake, whereby there was secured to the said Blake, his legal representatives and assigns, for the term of fourteen

years from said fourteenth day of August, 1860, the full and exclusive right of making, selling, using and vending to others the said improvements.

That thereafter, upon the due application of the said Blake, the said letters patent were duly extended to the said Blake by authority of law, upon the thirteenth day of August, A. D., 1874, for the term of seven years from and after the expiration of the original term for which said letters patent were granted; and thereafter, to wit, on the first day of March, 1875, the said Blake, by his instrument in writing of that date, duly recorded, and here in court to be produced, assigned to your orator all his right, title and interest in and to said letters patent, and the extended term thereof.

That thereafter, and before the thirteenth day of January, 1880, your orator, for good and lawful cause, and in compliance with the statute in such case enacted, surrendered the said extended letters patent unto the Commissioner of Patents, and prayed that the same might be reissued on an amended specification and claims; that thereafter, due proceedings were had on said application, and all the requirements of the statute in such case made and provided were complied with, and on the said thirteenth day of January, 1880, the said Commissioner caused new and amended letters patent
2*a* to be made out and delivered unto your orator, which are for an invention described and claimed in said original letters patent, are duly signed and sealed, and dated the day and year last above written, and are numbered reissue 9043, and grant and secure unto your orator, his legal representatives and assigns, for the term of twenty-one years from the fourteenth day of August, 1860, the full and exclusive right and liberty of making, using and vending to others the said invention which is described in said reissue No. 9043, as by said reissue No. 9043, or a duly authenticated copy thereof, in court to be produced, will more fully and at large appear.

2. Your orator further shows, that prior to the fourteenth day of August, A. D., 1860, the said Lyman R. Blake, then being a citizen of the United States, was the true, original and first inventor of certain improvements in boots and shoes, not before known or used, and which had not, at the time of his application for a patent, been in public use or on sale with his consent and allowance for more than two years prior to said application; that said Blake, so being the original and sole inventor of said improvements, applied for letters patent of the United States therefor, according to law, and on said fourteenth day of August, A. D., 1860, letters patent of the United States, executed in due form of law, and numbered 29562, for his invention or discovery, were duly issued to the said Lyman R. Blake, whereby there was secured to him, his legal representatives and assigns, for the term of fourteen years from said August 14, 1860, the full and exclusive right to make, use and vend to others the said improvements, as by said letters patent, or a duly authenticated copy thereof, here in court to be produced, will more fully and at large appear.

That thereafter, upon the application of said Lyman R. Blake

the said letters patent were duly extended by authority of law upon the thirteenth day of August, 1874, for the term of seven years from and after the expiration of the original term for which said letters patent were granted; and thereafter, to wit, on the first day of March, 1875, the said Blake, by his instrument in writing of that date, duly recorded, and here in court to be produced, assigned to your orator all his right, title and interest in and to said letters patent, and the extended term thereof.

3. And your orator further shows that in August, 1860, the said Lyman R. Blake duly assigned said original letters patent No. 29561 and No. 29562 to your orator, by his instruments in writing of that date, duly recorded in the Patent Office; and thereafter, to wit, on the eighth day of May, 1874, your orator, by his instrument in writing of that date, duly recorded in the Patent Office, duly reassigned both said letters patent to said Lyman R. Blake, who thereafter, on the first day of March, 1875, reassigned the same unto your orator, as hereinbefore set forth.

3½. And your orator further shows that prior to the 12th day of August, A. D. 1862, one R. H. Mathies and your orator, both then being citizens of the United States, were the true, original, and first inventors of certain improvements in sewing machines, not before known or used, and which had not at the time of their application for a patent been in public use or on sale with their consent and allowance for more than two years prior to said application; that the said Mathies and your orator, so being the original and sole inventors of said improvements, applied for letters patent of the United States therefor according to law, and on said 12th day of August, A. D. 1862, letters patent of the United States, executed in due form of law and numbered 36163, for their invention or discovery, were duly issued to the said R. H. Mathies and your orator, whereby there was secured to them, their legal representatives and assigns, for the full term of seventeen years from said 12th day of August, A. D. 1862, the full and exclusive right to make, use, and vend to others the said improvements.

That said Mathies and your orator, by their instruments in writing, duly recorded in the Patent Office, and to be here in court produced, duly assigned to your orator, as trustee as aforesaid, all their right, title, and interest in and to said inventions and said letters patent.

That thereafter and prior to the 6th day of July, A. D. 1875, your orator, for good and lawful cause and in compliance with the statute in such case enacted, surrendered the said letters patent No. 36163 unto the Commissioner of Patents and prayed that the same might be reissued on an amended specification and claim; that thereafter due proceedings were had on said application, and all the requirements of the statute in such case made and provided were complied with, and on the said 6th day of July, A. D. 1875, the said Commissioner caused new and amended letters patent to be made out and delivered unto your orator, which are for an invention described and claimed in said original letters patent, are duly signed and sealed and are dated the day and year last above written and are

numbered reissue 6535, and grant and secure unto your orator, his legal representatives and assigns, for the term of seventeen years from said 12th day of August, A. D. 1862, the full and exclusive right and liberty of making, using, and vending the said invention, which is described in said reissue 6535, as by said reissue No. 6535, or a duly authenticated copy thereof, to be here in court produced, will more fully and at large appear.

4. And your orator further shows that prior to the thirteenth day of December, A. D. 1864, the said Lyman R. Blake and your orator, both then being citizens of said State of Massachusetts, and of the United States, were the true, original and first inventors of certain improvements in sewing machines, not before known or used, and which had not, at the time of their application for a patent, been in public use or on sale with their consent and allowance for more than two years prior to said application; that said Blake and your orator, so being the original and sole inventors of said improvements, applied for letters patent of the United States therefor, according to law, and on said thirteenth day of December, A. D. 1864, letters patent of the United States, executed in due form of law, and numbered 45422, for their invention or discovery, were duly issued to the said Lyman R. Blake and your orator, whereby was secured to them, their legal representatives and assigns, for the term of seventeen years from said thirteenth day of December, A. D. 1864, the full and exclusive right to make, use and vend to others the said improvements.

That thereafter, to wit, on the eleventh day of October, 1866, the said Blake and your orator, by their instrument in writing of that date, duly recorded in the Patent Office, and here in court to be produced, assigned to your orator, as trustee as aforesaid, all their right, title and interest in and to said letters patent.

That thereafter, and before the eleventh day of November, 1879, your orator, for good and lawful cause, and in compliance with the statute in such case enacted, surrendered the said letters patent unto the Commissioner of Patents, and prayed that the same might be reissued on an amended specification and claims; that thereafter, due proceedings were had on said application, and all the requirements of the statute in such case made and provided were complied with, and on said eleventh day of November, 1879, the said Commissioner caused new and amended letters patent to be made out and delivered unto your orator, as assignee of said Lyman R. Blake and your orator, which are for an invention described and claimed in said original letters patent, are duly signed and sealed, and dated the day and year last above written, and are numbered reissue 8960, and grant and secure unto your orator, his legal representatives and assigns, for the term of seventeen years from the thirteenth day of December, 1864, the full and exclusive right and liberty of making, using and vending the said invention, which is described in said reissue 8960, as by said reissue No. 8960, or a duly authenticated copy thereof, in court to be produced, will more fully and at large appear.

3 5. And your orator further shows that prior to the sixth day of September, A. D. 1870, the said Lyman R. Blake, then being a citizen of the State of Massachusetts, and of the United States, was the true, original and first inventor of certain other improvements in sole-sewing machines, not before known or used, and which had not, at the time of his application for a patent, been in public use or on sale, with his consent and allowance, for more than two years prior to said application; that said Blake, so being the original and sole inventor of said improvements, applied for letters patent of the United States therefor, according to law, and on said sixth day of September, A. D. 1870, letters patent of the United States, executed in due form of law, and numbered 107,155, for his invention or discovery, were duly issued to said Lyman R. Blake, whereby there was secured to him, his legal representatives and assigns, for the term of seventeen years from said sixth day of September, 1870, the full and exclusive right to make, use and vend to others the said improvements, as by said letters patent, or a duly authenticated copy thereof, in court to be produced, will more fully and at large appear.

That thereafter, to wit, on the twenty-first day of November, A. D. 1870, the said Blake, by his instrument in writing of that date, duly recorded, and here in court to be produced, assigned to your orator all his right, title and interest in and to said letters patent.

6. Your orator further shows that prior to the first day of January, A. D. 1867, one Henry S. Vrooman, then being a citizen of the United States, was the true, original and first inventor of certain improvements in channeling and feather-edging machines, not before known or used, and which had not, at the time of his application for a patent, been in public use or on sale with his consent and allowance, for more than two years prior to said application; that said Vrooman, so being the original and sole inventor of said improvements, applied for letters patent of the United States therefor, according to law; and on said January 1, 1867, letters patent of the United States, executed in due form of law, and numbered 60807, for his invention and discovery, were duly issued to the said Henry S. Vrooman, whereby there was secured to him, his legal representatives and assigns, for the term of seventeen years from the said January 1, 1867, the full and exclusive right to make, use and vend to others the said improvements as by said letters patent, or a duly authenticated copy thereof, in court to be produced, will more fully and at large appear.

That thereafter, to wit, on the twenty-ninth of November, A. D. 1865, the said Vrooman, by his instrument in writing of that date, duly recorded, and here in court to be produced, granted to your orator exclusive license to use the said patented improvements.

7. Your orator further shows that immediately upon the issuing of each of said letters patent your orator introduced into public use the improvements therein respectively described; and that for several years prior to the granting of the license and lease to the defendant, hereinafter set forth, he had embodied each and all of said patented improvements in a sewing machine for uniting the

soles of boots and shoes to their vamps or uppers, well known to the public, and especially to manufacturers of boots and shoes, as the McKay sewing machine, and said machine was extensively used by shoe manufacturers in the manufacture of boots and shoes, under licenses from your orator, similar to that hereinafter referred to; all of which facts were and are well known to the defendant.

8. Your orator further shows, that on or about the 26th day of June, A. D. 1868, your orator, at the special request of the defendant and the said Ebenezer Tucker, granted to them a written license signed by them and your orator, and dated the 26th day of June, A. D., 1868, for the use of the McKay sewing machine, No. 233, which machine embodied all the patented improvements aforesaid, (except the improvement in channelers patented to said Vrooman and the improvements patented to said Blake by said letters patent No. 107,155), and also one channeling machine embodying said improvements patented as aforesaid to said Vrooman, and being machine No. 7, a copy of which lease and license is hereto annexed, and marked B, and made a part of this bill, and the original thereof is ready in court to be produced; that, thereafter, to wit, on or about the 2nd day of April, A. D., 1879, the McKay sewing machine, No. 490, containing the patented improvements aforesaid, (including the improvements patented to said Blake by said letters patent No. 107,155), was, by your orator, at the special request of the defendant, leased and licensed to the defendant, upon the terms set forth in said original lease, and, by agreement of both of said parties, the number of said machine, to wit, No. —, inserted in said original lease, and the said lease included and applied in all respects to said machine No. —; and thereafter said McKay sewing machine No. 7 was surrendered and delivered up by the defendant to your orator.

4 9. Your orator further shows, that by the express terms of said lease and license, the defendant was licensed to use upon said McKay sewing machines not only the patented improvements specifically named in said lease, but also all patents which your orator then had or might thereafter obtain, whether as original patentee, or by assignment or license, applicable to said machine, and all extensions, and renewals of the same; and that the said several machines so leased to the defendant aforesaid did in fact embody all the patented improvements hereinbefore set forth, and that the same greatly increased the efficiency and usefulness of said machines and their value to the manufacturer of boots and shoes.

10. Your orator further shows that in and by said lease, the lessees, the defendant, among other things, agreed to pay to your orator, as rent for the machines thereby leased, and for the use of the patents thereby licensed, the sum of one dollar for each and every pair of boots and shoes made by the aid of said machines, or any of them, and by the use of any of said patents, or any of them, provided, however, that in all cases when the lessees should purchase license stamps of the lessor, his successors, legal representatives or assigns, paying therefor in cash, on delivery of the stamps, at their denominational value, and should securely affix such

stamps, one stamp of proper denominational value to one of every pair of boots or shoes as soon as said boots or shoes are finished, and before they are boxed or exposed, or removed for sale or consignment, then and in such case, the price of license stamps should be, as in the schedule at the end of said lease; and the use of one stamp of the denominational value set forth in said schedule should be full payment and satisfaction of the rent for the use of said machine, and of the license for the use of said patents, for one pair of boots or shoes of the corresponding class in the schedule.

And the said lessees, the defendant, did therein further covenant and agree to keep an account of all boots and shoes made by them, or by any other person for them or for others, by the aid of the machine thereby leased, or by the use of the patents aforesaid, and to render an account thereof to your orator once in six months, namely, January 1st and July 1st, which account should specify the number of pairs of boots and shoes made as above mentioned, and the class to which they belonged, according to said schedule; and, also, that the operator of said machines should keep a daily account of all boots and shoes made in whole or in part by the aid of said machines, specifying the classes to which they belonged, and that they, the said lessees, the defendant, would send said account, on the first of each month, to your orator; and also that they would not in any way violate or infringe or contest the validity of any of the patents they were thereby licensed to use, or the sufficiency of their specifications, or the validity of the title of your orator to said patents, or any of them. And it was mutually agreed in and by said lease and license that the same should continue (provided the lessees complied with the terms and conditions thereof), until the expiration of all the letters patent which the said lessees were thereby licensed to use, or any extensions or renewals of the same, and that upon the expiration thereof, and upon the delivery of said machines in good order to the lessor, the said lessees should, thereupon, if they had kept all the conditions of said lease and license, have the right to purchase said machines for the sum of one dollar for each machine.

11. Your orator further shows, that the defendant and the said Ebenezer Tucker accepted said license, and the said machine, at the respective dates aforesaid, and continuously thereafter, and, up to the present time, the defendant has been in the use and enjoyment of said machines under said license, and are still in the use and enjoyment thereof, and the said license is now subsisting, and in full force, and the defendant continues in the use and enjoyment of all the rights and benefits thereof; your orator further shows that from the date of said license until about the 1st day of September, 1881, the defendant, so far as your orator is informed, or has means of information, substantially complied with the terms and conditions of said license, and that on or about the 5th day of January 1881, your orator *your orator* caused special notice to be given to said defendant, that unless he thereafter elected to stamp the shoes sewed by him on said machines, he would be required to pay the full license fee

of one dollar per pair, a copy of which notice is hereto annexed, as a part of this bill, and marked "C."

12. Your orator shows that since said 1st day of September 1881, the defendant has continued in the use and enjoyment of said machines, and of said patented improvements, under said license, and have sewed thereon a very large number of pairs of boots and shoes, amounting, as your orator is informed, believes and avers, to at least twelve hundred pairs per month, for each and every month since said 1st day of Sept. 1881; but the defendant has wholly neglected to purchase and apply to the boots and shoes sewed by him on said machine, the stamps provided for in said license, and has utterly neglected and refused to pay the rent and license fee provided in said license for the rent of said machines, and the use of said patents, namely, one dollar for each and every pair of boots and shoes made by the aid of said machines, or by the use of said patents, or any of them; and that since the 1st day of Sept. 1881 the defendant has neglected and refused to send to your orator the daily account kept, or to be kept by his operator, of all boots and shoes sewed on said machine, which account the defendant covenanted, and was bound to send to your orator monthly, on the first of each month, and the said defendant has also neglected and refused to render to your orator the semi-annual account due January 1, 1882, of the number of pairs of boots and shoes made by or for him on said machines, or by the use of said patents, or any of them, in the preceding six months, as provided for in said lease, and has also neglected and refused to render unto your orator the said semi-annual accounts due July 1, 1882; Jan. 1, 1883; Jan. 1, 1884, and July 1, 1884, as provided in said lease.

13. And your orator avers that special request has been repeatedly made of said defendant, and that blank forms have been furnished him for every month since said 1st day of Sept., 1881, for said monthly reports, and that on the second day of January, 1882, and again on the 1st day of July, 1882, special request was made of said defendant to furnish the said semi-annual account, copies of which requests are hereto annexed and marked D & E respectively, and made a part of this bill; but the defendant has refused to comply with said requests, or to furnish said accounts and to pay said royalties as he was bound to do in and by said license; and as your orator is informed and avers, the defendant, for the purpose of evading his just obligations under said license, falsely pretends that said license was terminated on or about the fifteenth day of August, 1881, and his obligation to pay any license fees thereunder then ceased, and his right to said machines free from the payment of all further license fees or royalties then accrued, because two of the patents named in said license, namely, the patents granted to Lyman R. Blake, August 14, 1860, expired on that day.

Whereas, in truth and in fact, as your orator avers, and as the defendant well knows, the said license did not terminate or expire on said 15th day of August, nor did the obligations of the defendant thereunder to pay license fees to your orator then cease, but are still

in full force, nor did all the letters patent which the defendant was licensed to use, and was in fact using, and has since continued to use under said license, expire on said 15th day of August; but the said letters patent, viz: Reissue No. 8960, and patent No. 107,155, and Channeler patent, No. 60807, were then and are now unexpired, and in full force, except said patent, No. 8960, which expired December 13, 1881, and said patent No. 60807, which expired Jan. 1, 1884, and the improvements covered thereby were then and are now embodied in the machines leased by your orator, as aforesaid, to the defendant, and constitute very important and valuable parts thereof, and the defendant has had, and continues to have the use and enjoyment thereof.

14. Your orator charges that he is entitled to a discovery and an account from the defendant of the numbers of pairs of boots and shoes sewed by or for him, on or by the aid of any and all the machines, or by the use of any of the patents embraced in said license since the 1st day of September, A. D., 1881, and the classes to which such boots and shoes belong, according to the schedule forming a part of said license; and, especially, to a discovery and account of the number of pairs of boots and shoes made by the use of said machines or any of them for the six months ending Jan. 1, 1882, July 1, 1882, and for each succeeding six months, respectively, which account shall specify the class to which such boots and shoes belong according to said schedule, and also to a discovery and account of the daily accounts by the operators of said defendant of all boots and shoes sewed on said machine since said 1st day of September, 1881, and that without such discovery and account, he is entirely remediless, and has no complete or sufficient remedy at law, and is entitled to discovery and relief in this court of equity, and especially to an injunction against said defendant restraining him from using either of said machines, or of said patented improvements, until he shall have paid to your orator the full amount which shall be found due to him from him under said license for said license fees.

15. Wherefore your orator prays that the defendant may be required to make a full disclosure and discovery, upon his corporal oath, and according to the best and utmost of his knowledge, information and belief, of all the matters aforesaid, and especially that he may be required to make full discovery of all boots and shoes sewed by or for him, on either and all of the machines, and by the use of any of the letters patent named or embraced in said letters patent, and embodied in said machines, and hereinbefore set forth, since said 1st day of September, A. D., 1881, and the class to which such boots and shoes belonged according to the schedule forming a part of said lease, and to render a full account thereof, and to produce all books and accounts showing the same, and also to make full disclosure and discovery of all daily accounts kept by the operator or operators of said machines since said 1st day of September, 1881, and to produce the same to this honorable court, and that he may be compelled to account for and pay over to your orator for each and every pair of boots and shoes sewed by or for him on said machine, or by the use of either of said patents since said 1st day of

September, 1881, and which were not duly stamped, the full license fee of one dollar for each and every pair, as provided in said
6 license, and that he may be enjoined and restrained from using either of said machines, or of said patented improvements, until he has fully paid the full amount thus found to be due to your orator, and all due damages; and for such other relief as equity may require, and that a writ of subpœna and other due process, as provided by law against said defendant, Henry H. Tucker, may be issued.

GORDON McKAY, *Trustee.*

UNITED STATES OF AMERICA, }
District of Massachusetts, Middlesex, } *ss:*

CAMBRIDGE, *September 19th*, 1884.

Then personally appeared the said Gordon McKay, and made oath that he has read the foregoing bill, by him subscribed, and knows the contents thereof; that the same are true, so far as stated upon his personal knowledge, and so far as stated upon information and belief, he believes them to be true.

OLIVER M. HOLMES,
Justice of the Peace.

7 "B."

Transfer from —— Lic.

License No. 1425.

[Revenue stamp, 5c., cancelled.]

This lease and agreement, made the 26th day of June, A. D. 1868, by and between Gordon McKay, trustee for the McKay Sewing Machine Association, of the first part, and Ebenezer Tucker & Henry H. Tucker, of East Stoughton, Mass., copartners, doing business in the town of East Stoughton, Mass., under the firm of E. Tucker & Son, of the second part.

Witnesseth, that the party of the first part, in consideration of one dollar to him paid by the said parties of the second part, the receipt of which is hereby acknowledged, doth lease unto the said parties of the second part, sewing machine, No. 490, for uniting the soles of boots and shoes to their vamps or uppers, constructed according to the specifications, and embodying the invention contained and set forth in letters patent of the United States, granted to Lyman R. Blake, on the sixth day of July, A. D. 1858; and channeling machine No. 7, said machinery also embodying other patents which
Bobbin winder 453
the said party of the first part now has or may hereafter obtain, applicable to the said machines or either of them.

And the said party of the first part doth hereby license the said parties of the second part and operatives in his employment, to use said machine upon the terms and conditions hereinafter set forth; and the said party of the first part doth also hereby license the said parties of the second part to use the said patent above mentioned,

granted to Lyman R. Blake, on the sixth day of July, A. D. 1858; and also the patents granted to the said Lyman R. Blake, on the 14th day of August, A. D. 1860, on the process of making a boot or shoe and on the article so made, for the term of the existence of said patents or any of them, and of all renewals and extensions of the same; said patents having been assigned by said Lyman R. Blake to said Gordon McKay, trustee, party of the first part; and also, all patents which the said party of the first part now have or may hereafter obtain, whether as original patentee or by assignment or license, applicable to said machine, and all extensions and renewals of the same: Provided, however, and this lease is made and this license is granted on the condition that the parties of the second part shall faithfully keep and perform all the conditions herein contained, on their part, and upon breach of said conditions or any of them, by the parties of the second part, the party of the first part, his successor, legal representatives, or assigns, may, at their option, cancel and terminate this lease and license, and upon written notice thereof by the said lessor, his successor, legal representatives, or assigns, to the said lessees, this lease and license shall terminate and possession of said machine shall thereupon revest in said lessor, his successor, legal representatives, or assigns.

And the said parties of the second part hereby agrees to keep and perform all the conditions of this lease and license, to wit:

First. The said lessee agrees to pay unto the said lessor, as rent for the machine hereby leased, and for the use of the patents hereby licensed, the sum of one dollar for each and every pair of boots or shoes made by the aid of said machine, and by the use of said patents or any of them; provided, however, that in all cases when the said lessees shall purchase license stamps of the said lessor, his successor, or legal representatives, or assigns, paying therefor in cash, on delivery of the stamps, at their denominational value, and shall securely affix such stamps, one stamp of proper denominational value, to one of every pair of boots or shoes as soon as said boots or shoes are finished, and before they are boxed, or exposed or removed for sale or consignment, then and in such case the price of license stamps shall be as in the schedule at the end of this instrument, and the use of one stamp of the denominational value set forth in said schedule, shall be full payment and satisfaction of the rent for the use of said machine, and of the license for the use of said patents, for one pair of boots or shoes of the corresponding class in the schedule.

And whenever any boots or shoes shall be unstamped or improperly stamped contrary to the provisions of this instrument, it shall be the right and duty of the lessor, whenever the same is known to him, and said boots or shoes are accessible to him, to cause the same to be properly stamped, and the price of each stamp so furnished and applied by the lessor (and which the lessees hereby agrees to pay) shall be the sum of one dollar; and said sum shall be received by the lessor in full satisfaction of all damages and expenses which he may incur in the premises.

Second. The said lessees hereby agrees that they will, as soon as

the boot or shoe is finished, and before boxing, paste on the sole of one shoe or boot of each pair sewed by them or by their employees, agents, or partners, by aid of any machine hereby leased, or of any patent hereby licensed during the continuance of this lease and license, one of the stamps aforesaid of a denominational value corresponding to the class to which such boot or shoe may belong, according to the schedule aforesaid; and that for all boots and shoes which the said lessees, their employees, agents, or partners shall sew for other persons, or that shall be sewed for other persons by any person upon the machine hereby leased, they will purchase of said lessor and furnish suitable stamps to be put on such boots and shoes; and said lessees agrees that they will be responsible for the rent of the said machine and the use of the said patents, and that stamps are put on such boots and shoes according to the schedule, and under the same conditions as to the price of stamps and rent, as if the shoes or boots had been made by themselves on their own account. And the said lessees agrees that they will not sell or in any way dispose of any stamps except when attached to boots or shoes as aforesaid, to any person or persons except the said lessor, his successor, legal representatives, or assigns, or his or their duly authorized agents as aforesaid.

And it is hereby agreed that for each and every pair of boots and shoes made or sold by or for the said lessees by the aid of the machine hereby leased, or by the use of the patents hereby licensed, which shall not have been properly stamped by them, or upon their default by the said lessor as hereinbefore provided, and which the said lessor shall prove has not been stamped, the said lessees shall pay to the said lessor, his successor, legal representatives, or assigns, the sum of one dollar as liquidated, fixed, and settled damages.

Third. The said lessees hereby agrees to keep an account of all boots and shoes sewed by them or by any other person for them or for others by the aid of the machine hereby leased, or by the use of the patents aforesaid, and to render an account thereof to the said lessor, his successor, legal representatives, or assigns, once in six months namely, January 1st and July 1st, which account shall specify the number of pairs of boots and shoes made as above mentioned, and the class to which they belong according to the schedule; and also that the operator shall keep a daily account of all shoes and boots sewed on the said machine, a copy of which the said lessees agree to send on the first of each month to the lessor; and whenever required by the lessor, his successor, legal representatives, or assigns, to make oath to the correctness of said returns, and to allow the lessor, his successor, legal representatives, assigns, or authorized agents to examine the original books and accounts of said lessees in order to verify the returns aforesaid.

And the said lessees agree to give the said lessor, his successor, legal representatives, or assigns, or his or their authorized agent or agents, free access at all times to the premises where the ma-
8 chine hereby leased is stored or operated, for the purpose of verifying the operator's reports, and in case operator's reports shall not be made as above provided, it shall be the right and duty of the lessor to appoint a competent man to keep the accounts

herein required; and all reasonable compensation for the services and expenses of such man, which shall not exceed three dollars per day, shall be at the charge of the said lessees, and the said lessees hereby agree to pay the same.

Fourth. The said lessees hereby agree that *he* will not in any way contest the validity of any of the patents they are hereby licensed to use, or the sufficiency of their specifications, or the validity of the title of the said lessor, or of his successor, legal representatives or assigns, to said patents, or any of them.

Fifth. This lease and license shall not be assignable by the lessees.

Sixth. The lessor for himself, his successor, legal representatives, and assigns, agrees that he will at any time on demand, redeem, but only of said parties of the second part, any unused stamps which the said lessees may have bought of said lessor or his authorized agents, at the same price as that paid for them by the said lessees.

Seventh. The said lessees are by this lease and license authorized to use the machine hereby leased only in East Stoughton, Mass.

Eighth. The following are agreed to by the parties aforesaid, as the terms of lease of the machine which the lessees are hereby licensed to use:

1st. That the power conveyed by this lease and license is only the right to use said machine and not the right to make or sell any machine embodying the patents aforesaid, or any of them; that a transfer or removal of the machine hereby leased can only be made with the consent of the lessor, or his successor, legal representatives, or assigns; and that if a sale, lease, transfer, or removal of said machine shall be made by the lessees, or by any legal officer, representative, or assignee, as the property of said lessees, without the consent of the lessor or his successor, legal representatives, or assigns, this lease and license shall thereupon terminate and expire, and the possession of said machine shall thereupon revest in the lessor, his successor, legal representatives, or assigns, and he or they may take possession of the said machine without the lessees having any claim for the repayment of any part of the sum or sums which they may have paid as consideration for the delivery of this lease and license, or for rent or license under this instrument.

2d. That in case the lessees refuse or neglect to perform, or violate any of the conditions of this lease and license, the lessor, his successor, legal representatives, or assigns, shall have the right to terminate this lease and license by giving written notice to the said lessees that he has elected so to do; and upon the giving of such notice this lease and license shall be terminated and the title and possession of said machine shall thereupon revest in the lessor, or his assigns, free and discharged of this lease and license, and the said lessor, his successor, legal representatives, or assigns, or his or their authorized agent or agents may thereupon enter the premises where said machine may be, and may take and remove the same, and the lessees shall have no claim whatever on account of any sum or sums they may have paid for or under this lease and license.

3d. That this lease and license shall continue (provided the lessees comply with the terms and conditions thereof) until the ex-

piration of all the letters patent which the lessees are hereby licensed to use, or any extensions or renewals of the same; and upon the expiration thereof, the lessees shall deliver to the lessor, his successor, legal representatives, or assigns, the machine hereby leased in good order, natural wear and tear alone excepted; and the said lessees shall thereupon, if they had kept all the conditions of this lease and license, have the right to purchase said machine for the sum of one dollar.

Ninth. In case any other machine than those now hereby licensed and leased, embracing any of the patents hereby licensed, shall hereafter come into the possession of the said licensees without a lease or license from said licensor, his successor, or assigns; then in case said licensor, his successor, or assigns shall so elect, all the covenants herein contained shall apply to such machine, and shall govern said parties respectively to the same extent as if the said machine had been expressly included in this lease and license. Said licensor shall give written notice of his election as aforesaid within 30 days after he shall have received written notice from said licensees of the possession of such machine, but may give such notice without having received notice from the said licensees of the possession of such machine.

Tenth. The said licensees agree that they will allow the said licensor, his successor and assigns, and his and their agents, at any time hereafter, to attach an indicator or counter to any machine embracing any of the patents hereby licensed, which now is or which may hereafter come into the possession of said licensees, for the purpose of recording the number of the revolutions of the cam shaft of said machine, and to examine, modify, repair, or replace the said indicator, and that they, the said licensees, will not disturb or interfere with, nor permit any one else to disturb or interfere with, any indicator which now is or which may be hereafter placed upon a machine as aforesaid.

Schedule of Prices of Stamps and Classification of Boots and Shoes when Stamps are Purchased and Applied According to the Provision in Clause First.

	Sizes.		Long-legged boots.	Shoes.	Buffalo overshoes.	Measure work.
	From No.	To No.				
Children's	1	10½ incl.	1 cent.	½ cent.	½ cent.	5 cents.
Misses'	11	2 "	.....	1 "	1 "	5 "
Women's	2½	and over.	.....	2 cents.	1 "	7 "
Youths'	9	13½ incl.	2 cents.	1 cent.	1 "	5 "
Boys'	1	5 "	2 "	2 cents.	1 "	7 "
Men's	5½	and over.	4 "	3 "	*2 cents.	9 "
Quilted	.....	.....	10 "	10 "	10 "	10 "
Army, not quilted	.....	.....	2 "	2 "		

*Reduced until further notice, to 1 cent per pair.

The stamp on men's, boys', youths', misses', children's and women's shoes, "when made with low-cut uppers without elastic sides, and without tie or buckle or other fastening to the upper, intending thereby to describe shoes commonly called 'slippers,'" is reduced until further notice, to one cent per pair.

The stamp on men's boots, made without crimping the upper at the ankle, commonly called opera boots, is reduced until further notice, to 3 cents per pair.

In witness whereof the parties aforesaid have hereunto put their hands and seals, the said parties of the second part binding themselves to all the foregoing agreements, both jointly and severally, with the understanding that the number of the machine may be entered after signing.

E. TUCKER & SON. [SEAL.]
GORDON McKAY, *Trustee.* [SEAL.]

9 "C."

McKAY SEWING MACHINE ASSOCIATION,
29 HIGH STREET, BOSTON, MASS., *January 5th*, 1881.

Messrs. E. Tucker & Son, East Stoughton, Mass.

DEAR SIR-: You are hereby notified that hereafter you will be required, in strict conformity with the terms of your lease, to pay one dollar a pair on all shoes that are sewed on the McKay sewing machines, or that are made by the use of any patents or machines you are licensed to use in license No. 1425, unless you shall, in all cases, in lieu thereof, buy stamps at schedule rates, and shall actually affix them to the soles of the shoes, as in said license provided, "as soon as the shoes are finished, and before they are boxed or removed for sale." And you are also notified that the stamps must be actually affixed in every case to the shoes, strictly as in said license provided, and that in case of your failure at any time so to do, I shall immediately cause all unstamped shoes to be stamped, charging you at the rate of one dollar per pair, as provided in clause first of your lease. And you are also notified that the operator's daily account must be kept, and that the monthly report and the semi-annual report must be kept and rendered strictly as in your lease provided, and that all the other provisions of the said license must be in all respects strictly complied with. And you are also notified that hereafter no settlement will be made with you for unstamped shoes, save as in the lease provided, at one dollar a pair, and that for any future infraction of the lease which the lease treats as cause for cancellation, your lease will be cancelled.

Yours respectfully,
(Signed) GORDON McKAY,
Trustee for the McKay Sewing Machine Association.

McKAY SEWING MACHINE ASSOCIATION,
29 HIGH STREET, BOSTON, MASS., —— —, 1881.

* * * * * * *

GORDON McKAY, *Trustee,*
(Signed) By —— ——.

"D."

Office of
McKay Sewing Machine Association,
29 High street, Boston, Mass.

JANUARY 2, 1882.

Messrs. E. Tucker & Son, East Stoughton, Mass.

SIR-: The semi-annual report showing the number of pairs of boots and shoes made by you, with the class to which they belong, agreeably to the third condition of your lease, is now due, and you are hereby requested to send the same to me without delay. The following is a copy of the third condition of the lease above referred to:

"Third. The lessee hereby agrees to keep an account of all boots and shoes made by him, or by any other person for him, or for others by the aid of the machines hereby leased, or by the use of the patents aforesaid, and to render an account thereof to the lessor, his successors, legal representatives or assigns, once in six months, namely, January 1st and July 1st, which account shall specify the number of pairs of boots and shoes made as above mentioned, and the class to which they belong according to the schedule."

Enclosed please find blank for purpose of making the report.

Yours respectfully, GORDON McKAY,
Trustee for the McKay Sewing Machine Association,
(Signed) By F. F. STANLEY.

10 N. B.—Insert number of sewing machine and sign.

Semi-annual Report of Lessee to the Trustee of the McKay Sewing Machine Association, Showing the Number of Pairs of Boots and Shoes Made by the Lessee, with the Class to which They Belong, Agreeably to the Third Condition of the Lease.

Machine No. —, lease No. —, made in six months ending —— —, 18—.

Class.	Sizes.		No. of pairs made.			
	From No. inclusive.	To No. inclusive.	Long-legged boots.	Shoes.	Buffalo overshoes.	Measure work.
Children's	1	10½				
Misses'	11	2				
Women's	2½	and over.				
Youths'	9	13½				
Boys'	1	5				
Men's	5½	and over.				
Quilted						

Dated at —— —, 18—.
(Sign) —— ——.

11 At the said May term, A. D. 1885, the following plea was filed:

Plea.

(Filed Sept. 28, 1885.)

The plea of Henry H. Tucker to the bill of complaint of The McKay Sewing Machine Association, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, for plea thereunto saith that the said McKay Sewing Machine Association is a copartnership, the members of which, other than said Gordon McKay, are Oliver M. Holmes, of Marshapee; Amos P. Tapley and Benj. V. French, of Lynn; Charles A. Jenks, of Somerville, and Frank F. Stanley, of Boston, all citizens of the State of Massachusetts and all alive, who ought to be joined as parties complainant to this bill.

Wherefore this defendant pleads the lack of proper parties to this bill, and prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to said bill, and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

HENRY H. TUCKER.

12 I certify that in my opinion the foregoing plea of the defendant to the bill of complaint of the McKay Sewing Machine Association is well founded in law, and that it is not interposed for the purpose of delay.

CHAS. ALLEN TABER,
Solicitor and of Counsel for Defendant.

UNITED STATES OF AMERICA, }
District of Massachusetts, } *ss:*

Henry H. Tucker, being duly sworn, does depose and say that he has read the foregoing plea to the bill of complaint in the suit of the McKay Sewing Machine Association against him, and that the same is not interposed for the purpose of delaying said suit or any of the proceedings therein, and that it is true in point of fact.

TYLER B. KING,
[SEAL.] *Notary Public.*

This cause was thence continued to the October term, A. D. 1885, when the following motion to amend plea was filed:

13 *Motion to Amend Plea.*

(Filed Nov. 12, 1885.)

And now comes the defendant in the above-entitled cause and asks leave to amend his plea by striking out the words between the

words "partnership" and "Oliver M. Holmes" and inserting words as follows: "or voluntary association composed with others, of."

By CHAS. ALLEN TABER,
Of Counsel for Respondent.

At the said October term, A. D. 1885, the following special replication was filed:

Special Replication.

(Filed Nov. 13, 1885.)

The replication of Gordon McKay, as trustee of the McKay Sewing Machine Association, to the plea of Henry H. Tucker.

This repliant, without waiving any objection to the plea of the said defendant for any of the errors and uncertainties thereof, for replication thereto denies that the said Oliver M. Holmes, Amos P. Tapley, Benj. V. French, Charles A. Jenks, and Frank F. Stanley, mentioned in said plea, are or that they have been at any time since the execution of the lease and license in the bill of complaint referred to partners in the legal title to the machines referred to in the said lease and license or in the letters patent therein referred to or in any of them or in any of the property whatsoever of said McKay Sewing Machine Association; but this repliant says that the legal title of all the property, both real and personal, of said association, including all interests in leases and patents and
14 all sums due as royalties under leases and licenses, was at the time of the execution of said lease solely in this repliant and has at all times since the 10th day of May, A. D. 1866, been solely in him, and that the only interest of the said Holmes, Tapley and Jenks, and Stanley, and also of a large number of other persons comprising said association, is a beneficial or equitable one, as hereinafter set forth, and that the said French has no interest whatever in said association.

And this repliant further says that he, having previously to the 10th day of May, 1866, acquired the legal title to a large amount of property, as set forth in the declaration of trust hereinafter referred to, and being on that day the sole legal owner thereof, did on that day execute an instrument under seal or declaration of trust, in and by which he declared that he held and would for the term of thirty years from said 10th day of May, 1866, continue to hold all said property and business rights and interests in trust for the benefit of all persons who were or who might become beneficially interested therein upon the terms and conditions in said deed set forth, and a copy of said instrument is hereto annexed and marked "A."

That upon the execution of said deed of trust by this repliant all the persons then interested in said property or business signed an agreement, in and by which they did severally bind themselves to receive from this repliant said declaration of trust and the certifi-

cates therein provided for as the sole evidence of their respective interests, and a copy of said agreement is hereto annexed
15 and marked "B."

That each person then interested thereupon received a certificate signed by this repliant, as trustee, certifying that such person was the owner of a certain number of shares in said association, and a copy of the form of such certificates is hereto annexed and marked "C."

And this repliant admits that he, the said Gordon McKay, and the said Holmes, Tapley, Jenks, and Stanley and each of them are holders of such certificates of ownership in said association and are beneficially interested as *cestuis que trust.* in the property of said association, of which said association this repliant is the sole trustee, as hereinbefore set forth.

And this repliant says that since said 10th day of May, 1866, he has in all respects and at all times conducted the affairs of said association in conformity with said deed of trust, and has represented and now fully represents all the beneficiaries under said deed, and that the lease and license to the defendant referred to in the bill of complaint was made by him as such trustee, and that all his transactions with the defendant in connection with said lease have been as such trustee.

That the interests of persons beneficially, as members of said McKay Sewing Machine Association, can, by the provisions of said deed of trust, be transferred by assignment of said certificates of ownership without power of interference or control by this repliant or other members of the association, and that such interests are and have been often so transferred; that the number of said
16 shares of stock of said association is fifty thousand and the same are now held by more than three hundred different persons, who are residents of several different States, by reason whereof it would be difficult, if not impossible, for your repliant to ascertain and state the names of all persons who are at any time beneficially interested in such business as members of said McKay Sewing Machine Association and to make them parties to suits and proceedings by him in their behalf.

Wherefore your repliant prays the judgment of this honorable court that the foregoing plea of the defendant may be overruled, and that he may be ordered to make answer forthwith to the bill of complaint and to pay to this repliant his reasonable costs incurred in this behalf.

MYERS & WARNER,
Solicitors and of Counsel for Complainant.

17 "A."

McKay Sewing Machine Association—Declaration of Trust.

Whereas Lyman Reed Blake, then of South Abington, Massachusetts, did by an instrument in writing executed by him on the 23d day of June, 1859, and duly recorded in the Patent Office of the

United States, June 25th, 1859, Liber H^5, page 287, of transfers of patents, assign and transfer to me, Gordon McKay, a certain invention for sewing the soles of boots and shoes to their vamps or uppers, and the patent granted to him by the United States, July 6th, 1858, No. 20775: and whereas all the inventions of said Blake relating to machines for sewing the soles to their vamps or uppers have been or by agreement with the said Blake are to be conveyed and assigned, so far as the same relate to the United States of America, to me, Gordon McKay: and whereas the several other inventions and patents therefor and licenses to use patents, relating to or useful in the sewing of the soles of boots and shoes to their vamps or uppers, enumerated in the annexed schedule have been granted to or acquired by me: and whereas I have, since the conveyance of said Blake's first patent to me, been engaged in manufacturing and perfecting, and introducing into general use among shoe manufacturers, machines made under said Blake's invention and patent, and the other inventions and patents above mentioned: and in the course of, and out of the profits of such business have purchased land in the city of Lawrence, Mass., in my own name, and erected a machine shop and buildings thereon, and have constructed and purchased machinery and tools for the manufacture of sewing machines, and for other purposes: and whereas, I have also in the course of said business acquired a controlling interest in the stock of the McKay Turned Shoe Company and received or become entitled to other personal property of various descriptions, including money, all of which will more fully appear by the book accounts and papers which I have kept and the more important items of which are enumerated in the following schedule, namely:

(The schedule, being recorded in full at the registry of deeds at Salem, Mass., and at the Patent Office in Washington, is omitted here.)

And whereas several other persons, besides myself, were, in the beginning of said business, when said invention and patent were first purchased of said Blake, and they, or their assigns, have continued to be and still are, interested in said property as hereinafter more particularly set forth, and in all the beneficial results and products of the same, and in all the subsequent business done and to be done in connection therewith: and whereas it is deemed advisable and for the advantage of all parties in interest that the said patents, inventions and business should continue to stand in my name, and all business thereunder to be done as heretofore for the benefit of all parties who are or may become interested, in the proportions to which they may be severally and respectively entitled.

Now therefore, I, the said Gordon McKay, do hereby acknowledge and declare that I hold all said inventions and patents hereinbefore mentioned, and said land and buildings and all the other property, rights and interest, of every name and nature, belonging to said inventions and property, and business done and to be done under and in connection therewith, and from the beginning of said business have held the same, or so much of it as then existed, strictly in trust, and the same shall continue, and all the products

and results thereof, to be held in trust for the benefit of all who are or may become interested therein upon the terms and conditions following, viz.:

First. All the persons having an interest in the property aforesaid, and in the profits and beneficial results of the business done under and with the same, and accepting this certificate and declaration of trust as the evidence of their title to such interest, shall constitute and be an association, which shall be called and known as the "McKay Sewing Machine Association," but no member of the association or party in interest in its property or business shall have any right or authority whatever to make any contract or bargain, or receive any money, or transact any business whatever, in behalf of or binding on the association, or any member thereof, except as he shall be specially authorized by or under the provisions of this declaration of trust.

Second. The association shall continue (unless previously dissolved as hereinafter provided) for the term of thirty years from the tenth day of May, A. D. 1866; and the death of any member thereof during said term shall not operate as a dissolution of said association, nor shall it have any effect upon the same or its operations or mode of business, except that the person or persons who shall become the lawful owner or owners of the interest of said decedent, shall succeed to all the rights of said decedent under this certificate, and upon the surrender thereof shall receive a certificate or certificates similar to this, according to their respective interests.

Third. Said association shall be the equitable owner of all the property aforesaid, and of the beneficial results and products of said property and business before named, held in trust by me, which shall be and by agreement of all the parties in interest hereby are divided into fifty thousand shares, forty thousand of which said shares shall be divided among the members constituting said association, according to their several and respective interests as the same may appear; and ten thousand shall be retained by the trustee, from which there shall from time to time be placed by the trustee to the credit of such persons, purchasers of stamps, as may be entitled to receive them under the provisions of an agreement signed by all the parties then in interest, dated May 1, 1863, so many of such shares as they may severally be entitled to, and such persons shall thereupon become members of this association. Certificates showing how many of said shares he is entitled to shall be issued to each member of said association, which certificates and the interests they represent shall be transferable, by assignment in writing upon the certificate and surrender of the same to the trustee, whereupon he shall issue a new certificate or certificates according to the interests of the parties. The trustee shall keep a record of all certificates issued, and of all certificates surrendered, which shall be at all times open to the inspection of any member of the association, and none but those appearing of the record to be the holders of certificates shall be entitled to dividends or to vote at any meeting of the shareholders.

Fourth. The general management and direction of said business

in future shall be vested in an executive committee of not less than three nor more than five persons, who shall be share-owners and shall be chosen by the share-owners at a meeting called by the trustee for that purpose, and shall serve until others are chosen to fill their places, a majority of whom shall constitute a quorum, a majority of which shall decide in all matters of business over which the executive committee have control, and any vacancy or vacancies in the executive committee may be filled by the remaining members until a meeting of the shareholders is held for an election.

Fifth. Upon the execution of this declaration of trust, the trustee shall issue and send by mail, to each and all the parties known to him to be interested in said property and the products and profits of said business, notice to meet at such specified place and hour, in Boston, as he shall appoint, for the purpose of organizing the association, and the adoption of by-laws, choice of an executive committee, and the transaction of any other needful business, and such notices shall be deposited in the Boston post-office seven days at least before the day of such meeting. At such meeting and at all other meetings of the shareholders a majority in interest shall constitute a quorum, and all votes passed not inconsistent with this declaration of trust by a majority at any meeting regularly called in accordance with the provision of the by-laws, when a quorum is present, shall be binding upon the trustee and the association and its officers and business. Special meetings may be called at any time by the trustee, and shall be called on application in writing by shareholders holding not less than one-fourth of the shares.

Sixth. The association shall adopt a code of by-laws for the government of the executive committee and the management of the business of the association; and the executive committee shall appoint an agent who shall have the responsible management under them of the business of the association: and the committee shall divide among the shareholders according to their several interests such profits earned as may remain after setting aside and reserving sufficient to pay all debts and defray the current expenses of the business.

Seventh. Whenever a majority in interest shall, at a meeting duly called for that purpose, vote to transfer the property and business of the association, or any portion thereof, to a corporation legally authorized to receive and hold the same, or to any other party or person, the trustee shall convey and transfer the same free and discharged of this trust, and thereafter no member of this association shall have any claim to or right in said property, patents and business, or the beneficial results thereafter accruing from the property and patents so sold and transferred except as he may be a stockholder in such corporation or otherwise interested in the purchase; and the proceeds of such sale shall, after all debts and liabilities of the association and business are paid, be divided among the members according to their respective interests; and upon such division, sale and transfer, if no further property remains in said trustee this association shall be dissolved.

Eighth. In case of the decease, resignation, or inability to act of

the trustee, a meeting of the shareholders shall be called by the executive committee, notice being given as before described in article 5th, at which meeting a trustee shall be chosen who shall succeed to all the rights and duties as trustee which now belong to me, the said Gordon McKay.

In witness whereof I have hereunto set my hand and seal this tenth day of May, 1866.

GORDON McKAY. [SEAL.]

In the presence of—
JAMES J. STORROW.

COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk Co., }

BOSTON, *May* 18, 1866.

Then personally appeared Gordon McKay, above named, and acknowledged the foregoing instrument by him subscribed to be his free act and deed.

Before me—

JAMES J. STORROW,
Justice of the Peace.

"B."

In consideration that the said Gordon McKay has agreed and does hereby bind himself and agree to deliver to each and every party having an interest in the property set forth in the foregoing certificate and declaration of trust, a certificate and declaration similar to the foregoing, expressing the several interests of each party, in case all of the persons interested in this property shall sign this agreement, we do hereby severally bind ourselves and agree to receive from said McKay such certificate and declaration of trust, as the sole evidence of our respective interests in the above-described property; and upon the receipt thereof, any other certificate or evidence of title which we may hold to said property shall become cancelled and void, and the same shall be surrendered to him, the said McKay.

18

"C."

No. 5499. Shares, —.

McKay Sewing Machine Association.

Total No. of shares, 50,000.

Certificate of Shares.

This certifies that —— ——, of ——, is the owner of — shares in the property of the McKay Sewing Machine Association, to be held and enjoyed by him, with all the rights and privileges, and subject to all the conditions and restrictions set forth in the declaration of trust, executed by Gordon McKay on the tenth day of May, 1866, and recorded in the registry of deeds at Salem, Mass, a copy of

which is printed on the back of this certificate; these shares are transferable by an assignment in writing on this certificate, and the surrender of this certificate to the trustee, when new certificates will be issued according to the transfer.

—— ——, *Trustee.*

Boston, —— —, 18—.

Transfer.

——, —— —, 18—.

For value received, I hereby assign and transfer the shares named in the above certificate, as follows:

Shares.	Name of assignee.	Post-office address.

New certificate to myself to balance.

(Sign here.).....

19 At the said October term the following petitions were filed:

Petition of Benjamin F. Moore.

(Filed Nov. 13, 1885.)

To the honorable the judges of the circuit court of the United States for the district of Massachusetts:

Respectfully represents your petitioner that he is and has been since July 1, 1884, one of the shareholders in the McKay Sewing Machine Association, of which Gordon McKay is trustee, holding the legal title of the property of the association; that said McKay has brought suit in said court in equity against one Henry H.
19½ Tucker (No. 2200) on a claim for a large amount of money in which your petitioner, as a shareholder and partner in said association, is beneficially interested; that said association has sold and transferred nearly all of its property and is doing no business except closing up its affairs, and that under the partnership articles of agreement and the declaration of trust of said McKay, a copy of which will be produced in court at the hearing on this petition, your petitioner is entitled to a certain ascertained proportional share in the proceeds of this and other like assets of the said association. Wherefore your petitioner prays that he may be admitted as a party complainant in said suit.

BENJ. F. MOORE.

Petition of Enoch W. Mower.

(Filed Nov. 13, 1885.)

To the honorable the judges of the circuit court of the United States for the district of Massachusetts:

Respectfully represents your petitioner that he is one of the shareholders in the McKay Sewing Machine Association, the legal title to the property of which is held by Gordon McKay, as trustee; that said McKay has brought suit in said court in equity against Henry H. Tucker on a claim for a large amount of money, being for about forty thousand dollars, in which your petitioner, as a shareholder and partner in said association, is beneficially interested; that said association has sold and transferred nearly all its property, having no assets except a few claims like this, and that under the partnership agreement and the declaration of trust of said McKay,
20 a copy of which will be produced in court at the hearing on this petition, your petitioner is entitled to a certain ascertained share in the proceeds of this and other like claims of the said association. Wherefore your petitioner prays that he may be admitted as a party complainant with said McKay in said suit.

ENOCH W. MOWER.

This cause thereupon came on to be heard and was fully heard on the foregoing plea and the same was overruled by the court.

At the said October term, A. D. 1885, the following answer was filed:

Answer.

(Filed Jan. 11, 1886.)

The answer of Henry H. Tucker to the bill of complaint of Gordon McKay, trustee of the McKay Sewing Machine Association.

This respondent, now and at all times hereafter saving and reserving to himself all manner of benefit or advantage of exception or otherwise that can or may be taken to the many errors, inconsistencies, and imperfections in said bill of complaint contained, for answer to said bill or so much or such parts thereof as he is advised it is material or necessary for him to make answer unto, answers and says that he admits the grant and issue of the letters patent of the United States as set forth in sections 1, 2, 3½, 4, 5, and 6 of said bill, and that the complainant was the legal owner thereof at the date of said bill. He further admits that a machine was constructed by the complainant which embodied some of the inventions claimed in said patents and delivered to this respond-
21 ent, and that the complainant licensed the respondent to use certain of said inventions, but he denies that said machine embodied in its construction the invention described in letters patent No. 107,155, dated September 6, 1870, or that the complainant

ever licensed this respondent to use or that he ever accepted a license to use the said patent No. 107,155, and he denies that said Gordon McKay is a citizen of the State of Rhode Island, and denies that the copy of the so-called lease and license attached to the complainant's bill and marked B is a true copy of the contract entered into by this complainant and defendant in relation to said machine, and denies that any lease or license was in force between the parties at the time of the date of this complainant's bill or that there had been any contract in force between them since December, 1881, and this respondent denies the right of this complainant to maintain this suit in this court under this contract, lease, or license set out in this bill or under any contract or license of a similar character, and says that the contract, lease, or license formerly existing and in force between the parties expired or has been terminated, and this respondent denies the sending or receipt of any of the notices set forth in said bill.

And, further answering the allegations in sect. 8 in said bill, this repliant says that the machine which he first received from the complainant and the license and lease delivered to him by the complainant and accepted by both parties at that time was satisfactory to him, and that said machine did not have applied
22 to it the invention set forth in letters patent No. 107,155, dated September 7, 1870, and that the complainant obtained from him an exchange of said machine by fraud and misrepresentation, and that this respondent demanded the return of his former machine and used the one No. 490 under the original license and under protest. As to sections 9 and 10 of said bill, this respondent is informed that they only state the interpretation or construction of the agreement as set forth and claimed by the complainant and requires no answer, because such construction is a matter for the court; therefore, not admitting anything in regard to said matter, this respondent declines to make any answer thereto unless directed to do so by the court.

This respondent admits that he accepted the first machine sent him by this complainant, and signed an agreement, lease, or license with the complainant at the time of such acceptance, and says that he has fully complied with all the terms of said agreement, and that at some time during the latter part of the year 1881 he notified the complainant that he claimed that agreement and license between them was ended, and that he claimed the machine as his own, free from the payment of any royalty on payment of the sum of one dollar tendered to the complainant at that time; and since that time he held the machine under a claim of ownership, and has not since complied with any of the terms of any so-called lease or license, and has refused to do so, and denied and now denies that said agreement was or is subsisting or in force, or that he was or is enjoying any rights or benefits thereunder; and he says that he has stamped all boots and shoes sewed or made in any way on
23 said machine during the continuance of his agreement or license with the proper stamp agreed upon; and, further answering, this respondent says that if it be proved that he has failed

to stamp any boots and shoes as required under any contract the claim of the complainant for rent or royalty for the use of said machine of one dollar a pair is unjust, inequitable, and extortionate, being out of all proportion to the price charged to others, and that said sum was inserted in the license and should be held to be only in the nature of a penal sum, which under no circumstances should be enforced by this court, except for so much as is due in equity and good conscience. Without waiving his rights or his claim that the license expired during the year 1881 and that this respondent owes the complainant nothing, he says that the utmost sum to which the complainant can be entitled is the sum of the denominational value of the stamps provided to be put on the boots and shoes sewed on said machine as named in the schedule in the license which the respondent failed to stamp to the time when the license or agreement expired or was terminated; and this respondent further says that if it shall be proved that any part of said machine was made in accordance with the invention described in letters patent No. 107,155 or any valid patent which did not expire on August 14, 1881, he avers and will maintain and prove that the complainant has waived his claim for a valid consideration to any royalty after August 14, 1881, either by purchase of stamps or otherwise, and that the particular improvement which the complainant claims was made on said machine under letters patent No. 107,155 were never applied to his machine, or if it was applied
24 it was done without the knowledge or consent of this respondent or of any one authorized to consent thereto and in fraud of his rights, and that the said mechanism was of no value to this respondent; and this respondent says that if he is liable to this complainant in any way, his liability *in* not under the license or agreement set forth in said bill, but only for such a sum as this court may find due in equity and good conscience as the proportional value of any of such patented improvements bear to the whole value of the machine and the agreed royalty; and this respondent says that soon after August, 1881, this complainant offered to the public for sale for the sum of two hundred and fifty dollars what is known as the McKay sewing machine without any reservation of royalty or accounting for or stamping of the boots and shoes sewed upon it, and that said machines embodied all the inventions claimed in the patents set forth in complainant's bill.

And this repliant denies that this complainant is entitled to any discovery or any account from him of the number of pairs of boots and shoes sewed by the aid of his machine either in this suit or in aid of any suit, and says that he has stamped all boots and shoes made on said machine up to the time when his license and agreement was ended, and denies that this court can entertain this bill as a bill for discovery of any of the matters pertaining to the business of this respondent.

And this repliant avers that this bill does not show any proper cause for an application to the equity jurisdiction of this court, and says that the complainant has a plain, adequate, and
25 complete remedy at law if he has any claim against this

repliant, and that he is not entitled to any discovery or other peculiar relief in equity, and that the various matters between these parties are such as a court of law is peculiarly adapted to try. Wherefore this defendant avers that this proceeding by bill in equity is inadmissible and wrong, and that this bill should be dismissed.

Wherefore this defendant prays the judgment of this court whether it ought to have further cognizance of this suit; and this respondent insists upon and will ask at the final hearing or otherwise the benefit of said matters of defense as if he had duly pleaded the same in bar to the whole of this bill or had for said matter and cause demurred to said bill, and he prays that this answer may be deemed and taken to be made under and subject to these said objections to the jurisdiction of this court and with a reservation of the full right and benefit to which this respondent is advised he is entitled by reason of said objections to this bill and proceeding in this suit, without this, that there is any other matter or thing in said bill of complaint contained material or necessary for this respondent to make answer unto and not herein well and sufficiently answered, traversed, confessed, avoided, or denied is not true to the knowledge or belief of this respondent, and he prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

HENRY H. TUCKER.

CHAS. ALLEN TABER,
Solicitor and of Counsel for Respondent.

26 UNITED STATES OF AMERICA, *District of Massachusetts*, } *ss*:

Henry H. Tucker, being duly sworn, does depose and say that he is the respondent named in the foregoing answer subscribed by him; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

HENRY H. TUCKER.

Subscribed and sworn to before me this 9th day of January, 1886.

CHAS. ALLEN TABER,
[SEAL.] *Notary Public.*

This cause was thence continued to the May term, A. D. 1886, when the following motion was filed:

Motion.

(Filed Sept. 15, 1886.)

And now comes the defendant in this cause and move- that the court assign a time for a hearing on the demurrer contained in the answer, or that the respondent may be allowed to file a demurrer on motion to dismiss or take such other action as the court shall

deem best to raise the question whether this court has jurisdiction of this cause.

By his attorney, CHAS. ALLEN TABER.

27 This cause was thereupon assigned by the court for hearing on October 15, 1886.

At the said May term, A. D. 1886, the following motion was filed:

Defendant's Motion to Dismiss.

(Filed Sept. 18, 1886.)

And now comes the defendant in the above-entitled cause and moves that it be dismissed from this court in equity, for that this court sitting in equity has no jurisdiction thereof, because, first, that it does not appear from the pleadings that the complainant has not a plain, adequate, and complete remedy at law; secondly, that it appears in this case that a plain, adequate, and complete remedy may be had at law.

By his counsel, CHAS. ALLEN TABER.

At the said May term, A. D. 1886, the following replication was filed:

Replication.

(Filed Oct. 13, 1886.)

The replication of Gordon McKay, trustee for the McKay Sewing Machine Association, to the answer filed herein.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says that he will aver, maintain, and prove his said bill to be true, certain, and sufficient in law to be answered unto, and that the said answer of the

28 said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in law to be replied unto, confessed, avoided, traversed, or denied, is true; all which matter and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as and is by his said bill he has already prayed.

GORDON McKAY, *Trustee,*
By MYERS & WARNER,
His Solicitors.

This cause was thence continued to the October term, A. D. 1886, when the same came on to be heard on defendant's motion to dismiss, and was fully heard on said motion on the fifteenth day of October, 1886, by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable George M. Carpenter, district judge for the district of Rhode Island, duly assigned to hold this circuit court,

sitting. On the twenty-seventh day of November, 1886, the opinion of the court was announced and the defendant's motion to dismiss was denied.

This cause was thence continued from term to term to the October term, A. D. 1889, when the following decree was entered:

29 *Decree for Complainant for Injunction and Account.*

(Entered Feb. 21, 1890.)

COLT, *J.*:

This cause came on to be heard at this October term, to wit, February 21, 1890, upon the pleadings and proofs and in the presence of counsel for the respective parties; and now, upon consideration thereof, it is ordered, adjudged, and decreed as follows, namely, that the lease and license granted by the complainant to the defendant, dated June 26, 1868, a copy of which is annexed to the bill of complaint, continued in full force until the sixth day of September, A. D. 1887, that being the date of the expiration of the latest patent embodied in the machine leased and licensed to the defendant in and by the agreement aforesaid, the said patent being the patent originally issued to Lyman R. Blake, September 6, 1870, and numbered 107,155, as set forth in the bill.

And it is further ordered, adjudged, and decreed that the defendant render an account and make discovery to the complainant of all boots and shoes sewed, either in whole or in part, by or for him upon or by the aid of said machine or any of the said patents embodied in said machine since the 15th day of August, 1881, down to said 6th day of September, 1887.

And it is further ordered, adjudged, and decreed that this cause be referred to Henry L. Hallett, Esquire, as master, to take and report to the court an account of all boots and shoes sewed in whole
or in part by or for the defendant upon or by the aid of the
30 McKay sewing machine, or machines licensed to him by said agreement or by the aid of any of the patented improvements embodied in said machine at the date of said license, from the 15th day of August, 1881, down to said sixth day of September, 1887, said account to show the number of pairs thus sewed during each month from said 15th day of August, 1881, to said sixth day of September, 1887, and to show the classes to which such boots and shoes belonged, according to the schedule forming a part of said lease and license, and to show also the number of pairs of boots and shoes thus sewed during each month of that period, which were not stamped as required by the terms of said lease and license.

And the master is authorized and directed to require the defendant to produce all books, papers, writings, memoranda, entries, vouchers, and other documents, whether kept or made by himself or by his servants or agents or the operators of said machine, applicable to said account, and to be only examined in reference thereto.

And it is further ordered, adjudged, and decreed that the complainant recover from the defendant his costs of suit.

By the court:

JOHN G. STETSON, *Clerk.*

This cause was thence continued from term to term to this present October term, A. D. 1891, when the following report of the master is filed:

31 *Master's Report.*

(Filed March 5, 1892.)

(MEMORANDUM.—The master's report is omitted in this transcript by direction of the parties, the same not being deemed necessary for the determination of the question of jurisdiction.

JOHN G. STETSON, *Clerk.*)

At this present term the following paper is filed:

Exceptions to Master's Report.

(Filed April 13, 1892.)

(MEMORANDUM.—These exceptions are omitted in this transcript by direction of the parties, the same not being deemed necessary for the determination of the question of jurisdiction.

JOHN G. STETSON, *Clerk.*)

On the twelfth day of May, 1892, the following decree is entered:

Final Decree.

(Entered May 12, 1892.)

COLT, *J.:*

This cause came on to be further heard at this prerent October term, 1891, upon the coming in of the master's report and the filing of exceptions thereto by the defendant, and counsel were heard thereon, and now, to wit, May 12, 1892, it is ordered, adjudged, and decreed that the exceptions of the defendant to the master's report be, and they are hereby, overruled, and that the master's report be, and the same is hereby, confirmed; and thereupon it is further ordered, adjudged, and decreed that the complainant recover of the defendant the sum of $4,665.43 damages and $1,831.16 interest thereon from the various times when the license fees fell due,
32 making a total of $6,496.59, and costs of suit, taxed at $631.71.

By the court:

JOHN G. STETSON, *Clerk.*

From this decree the defendant in open court claims an appeal to the Supreme Court of the United States.

A true record.

JOHN G. STETSON, *Clerk.*

A true copy.

Attest: JOHN G. STETSON, *Clerk.*

Proceedings Subsequent to Final Decree.

On the twenty-third day of June, 1892, the defendant files the following petition for appeal and assignment of errors:

Petition for Appeal and Assignment of Errors.

(Filed June 23, 1892.)

Circuit Court of the United States, District of Massachusetts.

HENRY H. TUCKER, Respondent and Appellant,
v.
GORDON MCKAY, Trustee, Complainant and Appellee. } No. 2200.

The above-named respondent, believing himself aggrieved by the final decree of the above-entitled court, entered on May 12,
33 1892, in the cause in equity No. 2200, Gordon McKay *v.* Henry H. Tucker, hereby appeals therefrom to the Supreme Court of the United States, and assigns the following as errors asserted and intended to be urged, viz:

First. That the said circuit court erred in taking jurisdiction of the bill of said complainant in said cause.

Second. That the said circuit court erred in that it did not dismiss the bill of said complainant in said cause for want of jurisdiction.

Third. That the said court erred in making a final decree in said cause when it had no jurisdiction of the matter in controversy.

Wherefore the above-named respondent respectfully petitions that his appeal may be allowed from said decree to the Supreme Court of the United States, and that the question of the jurisdiction of the circuit court may be certified to the Supreme Court of the United States for decision.

CHAS. ALLEN TABER,
Attorney for Respondent, Henry H. Tucker.

On said twenty-third day of June, 1892, the defendant giving good and sufficient security that he will prosecute his appeal to effect and answer all costs if he fail to make his appeal good, said appeal is allowed and a citation is issued thereon, returnable in the
34 Supreme Court of the United States, holden at Washington, on the twenty-second day of July, 1892.

A true record.

JOHN G. STETSON, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

35 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *District of Massachusetts,* } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the district of Massachusetts, within the first circuit, certify that

the foregoing is a true copy, as made up by direction of the parties hereto, of so much of the record as is necessary for the determination of the question of jurisdiction in the cause in equity entitled Gordon McKay, trustee, complainant, *v.* Henry H. Tucker, defendant, No. 2200, in said circuit court determined.

I further certify that annexed hereto are true copies of the following papers: (1) Opinion of the court, announced November 27, 1886, in accordance with which defendant's motion to dismiss this cause was denied; (2) Bond to party on the appeal in said cause, and also that annexed hereto, is the original citation on said appeal, with acknowledgment of service thereof.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this twenty-first day of July, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the one hundred and seventeenth.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

36 Circuit Court of the United States, District of Massachusetts.
In Equity.

GORDON MCKAY, Trustee, *v.* FRANK W. SMITH *et al.* } No. 2081.

SAME *v.* HENRY H. TUCKER. } No. 2200.

Opinion of the Court (*November* 27, 1886).

COLT, *J.:*

In these two cases the bills are substantially alike. The defendants have filed a motion to dismiss in each case on the ground that the plaintiff has a plain, adequate, and complete remedy at law. The bills set forth a license to the defendants to use certain patents embodied in machines leased to the defendants. The license provides among other things that the licensee shall pay the sum of ten cents for every pair of shoes made by the aid of the machines or by the use of the patents or any of them, or instead thereof he shall purchase and affix to every pair of shoes a license stamp of a value to be determined by reference to a schedule attached to and forming part of the license. The licensee agrees to keep an account of the shoes made, and to render an account every six months to the licenser. It was also agreed that the license shall continue until the expiration of all the patents, or any extensions or renewals of the same. The bills allege that the defendants have continued
37 to use the machines, making many pairs of shoes monthly, and that since August or September, 1881, they have wholly neglected to purchase and affix stamps to the shoes made by the machines, and that they have refused to pay any license fees, neg-

lected to render any accounts, and that they have removed from the machines the indicator registering the amount of work done. The prayer of the bills is for discovery and account, also that the defendants may be decreed to pay the license fees found due, and that they may be enjoined from using the machines until they have paid the amount found due under the license.

The only question raised by these motions to dismiss is, whether upon the allegations contained in the bills the plaintiff has made a case cognizable in a court of equity, or whether his proper remedy is at law. I think the plaintiff has brought himself within recognized grounds of equitable jurisdiction, and that the motions should be denied. The bills not only pray for discovery and account, which of themselves might be deemed insufficient in this class of cases, but they also pray for an injunction against the use of machines embodying patents which are unexpired. Bills of this character have frequently been sustained by the courts. Goodyear *v.* The Congress Rubber Company, 3 Blatch. 449; Woodworth *v.* Weed, 1 Blatch. 165; Wilson *v.* Sherman, 1 Blatch. 536; Eureka Company *v.* Bailey Company, 11 Wall., 488; Magic Ruffle Company *v.* Elm City Company, 13 Blatch. 151; White *v.* Lee, 3 Fed. Rep. 222; Nesmith *v.* Calvert, 1 Wood & Minot, 34.

In Crandall *v.* Plano Company, 24 Fed. Rep. 738, and in Perkins *v.* Hendryx, 23 Fed. Rep. 418, no injunction was asked for.

Motions denied.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

38 (*Bond to Party on Appeal.*)

Know all men by these presents that we, Henry H. Tucker, of Avon, in the district of Massachusetts, as principal, and John F. Foster, of said Avon, and James M. Marden, of Boston, in said district, as sureties, are held and firmly bound unto Gordon McKay, of Newport, in the State of Rhode Island, trustee for the McKay Sewing Machine Association, in the full and just sum of five hundred dollars, to be paid to the said Gordon McKay, trustee, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twenty-third day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at a circuit court of the United States for the district of Massachusetts, in a suit in equity depending in said court between the said Gordon McKay, trustee, complainant, and the said Henry H. Tucker, defendant, a decree was rendered against the said defendant, and the said defendant having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said complainant, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the twenty-second day of July next;

Now, the condition of the above obligation is such that if the said defendant shall prosecute his said appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

HENRY H. TUCKER. [L. S.]
JOHN F. FOSTER. [L. S.]
JAMES M. MARDEN. [L. S.]

Signed, sealed, and delivered in presence of—
A. H. TROWBRIDGE.

Approved:
LE BARON B. COLT,
Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

39 THE UNITED STATES OF AMERICA:

To Gordon McKay, of Newport, in the State of Rhode Island, trustee for the McKay Sewing Machine Association, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the twenty-second day of July next, pursuant to an appeal claimed and allowed by the circuit court of the United States for the district of Massachusetts, in a cause in equity wherein Henry H. Tucker, of Avon, in the district of Massachusetts, is defendant and appellant and you are complainant, to show cause, if any there be, why the decree rendered against the said defendant should not be reversed and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Le Baron B. Colt this twenty-third day of June, in the year of our Lord one thousand eight hundred and ninety-two.

LE BARON B. COLT,
Circuit Judge.

BOSTON, *July 1st*, 1892.

Sufficient service of the foregoing citation is hereby acknowledged.

J. B. WARNER, *Att'y.*

[Endorsed:] Citation. McKay *v.* Tucker.

Endorsed on cover: Case No. 15,089. Massachusetts C. C. U. S. Term No., 139. Henry H. Tucker, appellant, *vs.* Gordon McKay, trustee for the McKay Sewing Machine Association. Filed July 23d, 1892.

164-701

Office Supreme Court, U. S.
FILED
OCT 10 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 20.

HENRY H. TUCKER, Appellant,

v.

GORDON McKAY, Trustee, Appellee.

BRIEF FOR APPELLANT.

CHAS. ALLEN TABER, *of Counsel.*

164-701

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Supreme Court of the United States.

OCTOBER TERM, 1895.

No. ~~134~~ 20.

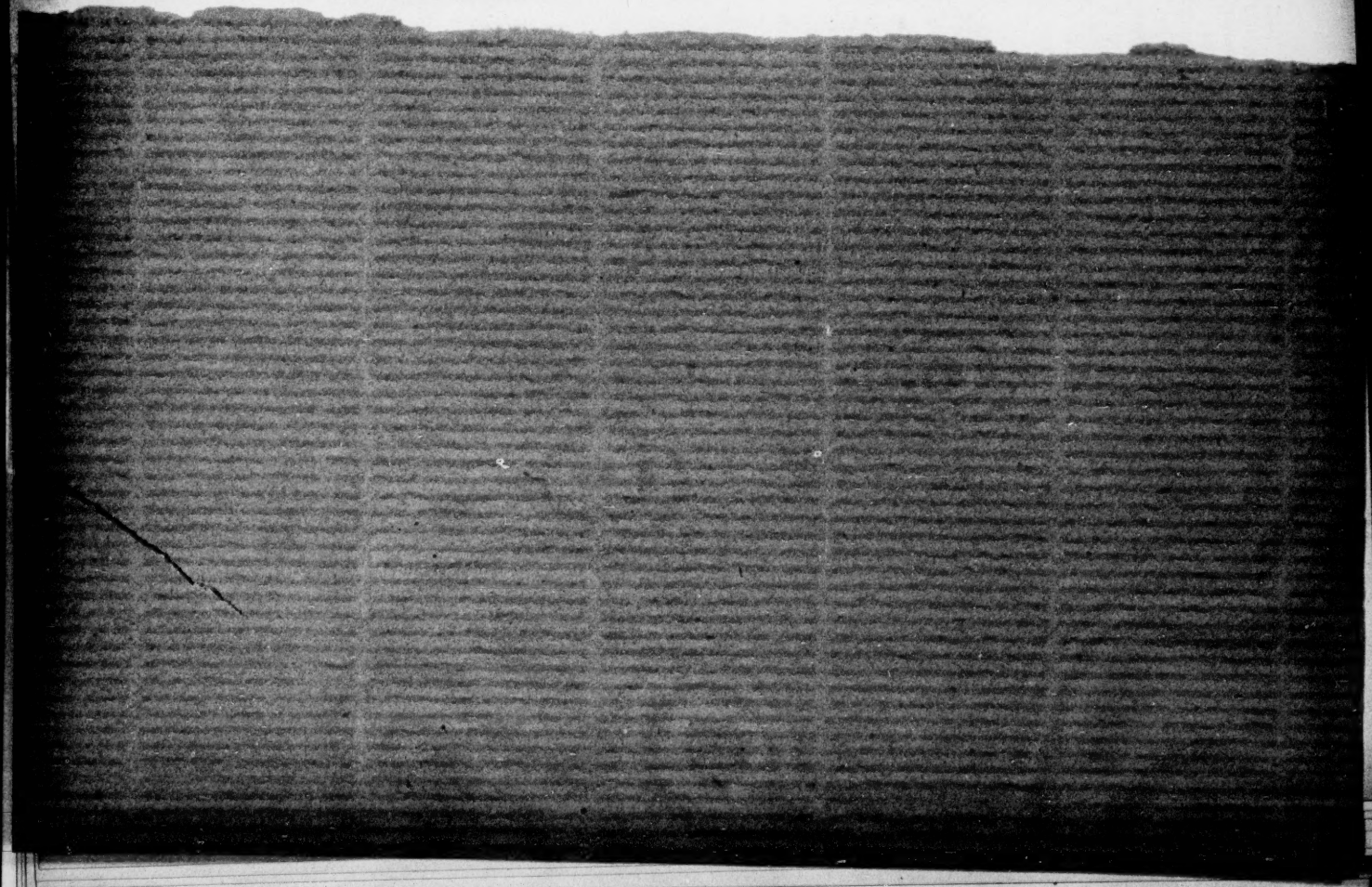
HENRY H. TUCKER, Appellant,

v.

GORDON McKAY, Trustee, Appellee.

BRIEF FOR APPELLANT.

CHAS. ALLEN TABER, *of Counsel.*



Supreme Court of the United States.

TERM NO. 139. OCTOBER TERM, 1895.

HENRY H. TUCKER, *Appellant*,

v.

GORDON MCKAY, *Appellee*.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the Circuit Court for the District of Massachusetts, sitting in Equity.

The bill filed Aug. 10, 1885, was brought by the complainant below, appellee in this court, upon a lease, reserving rent or license fees, of certain machines for making shoes, which the said plaintiff owned, in which were embodied sundry patented inventions, owned by said plaintiff. The bill prays for discovery, an account, payment to complainant of the amount of rent found due, and an injunction to restrain the defendant below from using any of the aforesaid machines or inventions until he had fully paid the amount thus found to be due.

The lease was annexed to the bill and is printed in the record, pages 10 to 15.

The bill alleges the ownership by the plaintiff below of several letters patent for improvements in machines for making shoes, the embodiment of such improvements in machines, and the lease by him by a written instrument to the defendant below of certain machines, with the right to use such patented improvements so far only as they were embodied in said leased machines.

The bill goes on to recite that in and by said lease the lessees agreed to pay, as rent or license fees for the machines and for said use of said patented inventions in said machines, the sum of one dollar for every pair of boots or shoes made by the aid of any of said machines, or of any of said patents; or, instead thereof, to purchase and affix to one of each pair of boots or shoes thus made a license stamp of a certain denominational value, to be determined by the class to which the shoe might be found to belong by reference to a schedule forming a part of the lease. This stamp the lessees agreed to affix in every case.

(The stamp in nearly every case cost this defendant only three cents. See Schedule, page 14 of record.)

The bill then alleges that the said defendants below agreed to keep an account of all boots or shoes sewed by or for them by the aid of any of said machines, to make certain monthly and semi-annual reports to the plaintiff below showing the number of pairs of each kind of boots and shoes so sewed; that said defendants agreed they would not contest the validity of any of said patents or of the lessor's title to them; that it was mutually agreed that the lease should continue until the expiration of all the patents which the lessees were licensed to use, and that at its expiration the lessees, having observed all the conditions of the lease, might, if they pleased, buy the machines for one dollar each.

The bill further alleges that the lessees accepted the lease and the machines and are enjoying the use of the latter, *and that the lease is still in force;* that the lessees for some time bought stamps and properly affixed them to the boots and shoes sewed by said machines, but for a long time past had failed and refused, and still failed and refused, either to stamp the boots or shoes, or to pay the royalty, or to render any account whatever, claiming that the lease had ended, and that they were entitled to said machines upon payment of one dollar each.

The bill then charges that the plaintiff below is entitled to a discovery and account of all boots and shoes sewed by aid of any of said machines, or of any of said patented improvements, and to an injunction restraining the defendant below from using any of said machines until they shall pay the plaintiff the amount due him for

rent and license fees under said lease, and prays for relief in accordance with said charge. Record, page 1 to 10.

The bill contained an averment that the complainant was a citizen of the State of Rhode Island and that the defendant was a citizen of the State of Massachusetts.

There is no allegation in the bill which gives the Circuit Court any jurisdiction of this cause on any ground except that of the diverse citizenship of the parties.

A plea in abatement containing an averment that the complainant was a citizen of the State of Massachusetts was filed. (Page 17 of record.)

The plea of the defendant was followed by the answer (page 25 of record) in support of the plea, under oath as required by the bill.

In the answer on the top of page 26 of the record the defendant "denies that said Gordon McKay is a citizen of the state of Rhode Island," and on page 28 of the record the defendant in his answer pleads "Wherefore this defendant prays the judgment of this court whether it ought to have further cognizance of this suit; and this respondent insists upon, and will ask at the final hearing or otherwise, the benefit of said matters of defense as if he had duly pleaded the same in bar to the whole of this bill or had for said matter and cause demurred to said bill; and he prays that this answer may be deemed and taken to be made under and subject to these said objections to the jurisdiction of this court; and with a reservation of the full right and benefit to which this respondent is advised, he is entitled by reason of said objections to this bill and proceeding in this suit."

There is no evidence that the complainant was a citizen of Rhode Island, or of any place other than the State of Massachusetts.

On page 25 of the record the clerk certifies, "This cause thereupon came on to be heard and was fully heard on the foregoing plea, and the same was overruled by the court."

The clerk's certificate (page 32 and 33 of record) states: "The foregoing is a true copy, as made up by direction of the parties hereto, of so much of the record as is necessary for the determination of the question of jurisdiction in the cause in Equity entitled Gordon McKay, Trustee, Complainant, *v.* Henry H. Tucker, Defendant, No. 2200, in said Circuit Court determined."

"The foregoing" includes the plea (page 17 of record), the answer (page 25 of record) and the motions to dismiss (pages 28 and 29 of record).

The record shows on page 29 the Replication, and on page 31 the Final Decree (entered May 12, 1892,) and the appeal to this court. On page 32 of the record appears the Petition for Appeal and the Assignment of Errors. On pages 34 and 35 of the record appears Bond to Party on Appeal, approved by the Circuit Judge for the District of Massachusetts allowing the appeal.

THE QUESTION OF JURISDICTION IS PROPERLY CERTIFIED TO THIS COURT.

No particular form of words is prescribed or is necessary. "It is sufficient if there is a plain declaration that the single matter which is by the record sent up to this court for decision is a question clearly, fully and separately stated. . . . The record must affirmatively show that the trial court sends up for consideration a single definite question of jurisdiction." If that is done, it is enough.

Shields v. *Coleman*, 157 U. S. 177.
See also *in re* Lehigh Co., 156 U. S. 322.
Smith et al. v. McKay Tr. 161 U. S. 355.

THE PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS

in the court below was properly framed to set forth the question of jurisdiction.

The reasons of appeal were as follows (page 32 of record):

First. That the said Circuit Court erred in taking jurisdiction of the bill of said complainant in said cause.

Second. That the said Circuit Court erred in that it did not dismiss the bill of said complainant in said cause for want of jurisdiction.

Third. That the said court erred in making a final decree in said cause when it had no jurisdiction of the matter in controversy.

This Assignment of Errors complies with the thirty-fifth rule; viz., that it "shall set out separately and particularly each error asserted and intended to be urged."

But if it could be considered defective for want of specifying what the question of jurisdiction was, such objection will not be taken here, as the provision of the rule that "no appeal shall be allowed until such assignment of errors shall have been filed" shows that the assignment of errors is intended for the information of the court below. In the present case it was deemed by that court sufficient, for the appeal was allowed.

Even if there had been no assignment of errors in the court below accompanying the appeal, it would not disturb the standing of the appeal in this court, which would hear it on the specification of errors contained in the appellant's brief.

Ackley v. *Hall*, 106 U. S. 428.

THE APPEAL PROPERLY COMES FROM THE CIRCUIT COURT DIRECTLY TO THIS COURT, BECAUSE THE JURISDICTION OF THE COURT IS IN ISSUE.

Act of March 3, 1891, creating the Circuit Court of Appeals (Sect. 5) Smith et al v McKay Tr. 161 U.S. 35

THE LACK OF POWER IN A COURT OF THE UNITED STATES TO DECIDE THIS CASE ON ITS MERITS.

The courts of the United States have only a special and limited jurisdiction, with only the powers which have been given to them by the Constitution and laws of Congress. Within certain limits their jurisdiction is exclusive, while in other cases it is concurrent with that of the courts of the several States. It is therefore necessary that the pleadings in a court of the United States show clearly and specifically the grounds on which rest the jurisdiction of the court. If these do not appear in the pleadings, or if at any time there is a failure in them, the suit may be dismissed, and in most cases it must be dismissed, although all the parties and their counsel may desire to have it go on to a final decree or judgment.

This cause comes to this court on appeal on the question of the jurisdiction of a court of the United States to hear the cause on the merits and to render a final decision on these pleadings.

The error of the court below was in making a final decree instead of dismissing the bill when it had no jurisdiction on account of the

subject-matter in the suit (Hartell *v.* Tilghman, 99 U. S. 547), and no jurisdiction on account of the diverse citizenship of the parties was shown in the pleadings.

The question of the jurisdiction of the Circuit Court was raised by a plea in abatement (page 17 of record) and in the answer (page 25 of record). There was no evidence offered as to the citizenship of the parties.

The plea on page 17 of record sufficiently raises the question of the jurisdiction of the court. It sets forth that the parties therein named are "all citizens of the State of Massachusetts," and the defendant "prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to said bill."

The plea is sworn to by the defendant and has the certificate of counsel, as required by the rules.

The defendant filed a "Motion to Amend Plea" (bottom of page 17) but this motion was not allowed by the court nor agreed to by the complainant, and was not considered by the court. It was the plea, and not an amended plea, which was overruled by the court. On page 25 of record is found "This cause thereupon came on to be heard and was fully heard on the foregoing plea, and the same was overruled by the court."

The complainant filed (pages 18 to 24 of record) what he calls a "Special Replication." This so-called "Special Replication" is not a replication and does not join issue on the plea of the defendant.

It does not aver the truth of the allegation in the bill nor deny the truth of the allegation in the plea, that the complainants in the suit "are all citizens of the State of Massachusetts." It is rather in the nature of a demurrer to the equity of the allegation in the plea that the parties named therein are partners in the McKay Sewing Machine Association. It has no proper place in these pleadings.

Farley v. *Kittson et als.*, 120 U. S. 303-316.
Banks v. *Manchester*, 128 U. S. 244-252.
Chitty on Pleadings (10 Am. Ed.), Sect 1142.
Stephen on Pleading (3d Am. Ed. Tyler), 345. [*See last page.*]

The plea was followed by the answer of the defendant (page 25 of record) ~~in support of the plea~~, under oath as required by the bill. Near the top of page 26 of the record the answer "denies that

said Gordon McKay is a citizen of the State of Rhode Island," and on page 28 of the record the answer raises the question of the jurisdiction of the court "to have further cognizance of this suit," and "prays that this answer may be deemed and taken to be made under and subject to these said objections to the jurisdiction of this court."

The court below ought to have held on this plea that it had no power to hear the cause for want of jurisdiction.

Story Eq. Pl. Sec 657 Daniels Ch. Pl Sec 604-5

Monroe Cattle Co. v. *Becker*, 147 U. S. 47.
Beals v. *Ills. M. T. R.R. Co.*, 133 U. S. 290.
Farley v. *Kittson et als.*, 120 U. S. 303-315.

This is a bill for discovery and relief, and expressly calls for an answer under oath. The answer clearly and explicitly denies that the plaintiff is a citizen of Rhode Island. (See transcript of record, page 26, lines 2 and 3.) And on page 28 of the record the respondent denies the jurisdiction of the court. It is necessary in this case for the complainant to prove the allegation that the parties are citizens of different States, as there can be no claim made that a Federal Court has jurisdiction of this cause upon any other ground than that the parties are citizens of different States. As this answer denies so explicitly and under oath an allegation in the bill necessary to maintain the jurisdiction of the court, the complainant is required to prove the allegation by some evidence more than the testimony of one witness.

In this case we raise the question of the jurisdiction of the court below in the pleadings. In such cases the Federal Courts have been prompt to take notice of the want of jurisdiction and their power to hear the cases, and to declare that they cannot enter any decree except one ordering the cases dismissed.

Parker v. *Ormsby*, 141 U. S. 81.
Morrison et al. v. *Durr et al.*, 122 U. S. 518.
Monroe Cattle Co. v *Becker*, 147 U. S. 47.
Farley v. *Kittson et als.*, 120 U. S. 303-315.
Dunlap et al. v. *Schofield et al.*, 152 U. S. 244.
Am. File Co. v. *Garrett*, 110 U. S. 288.
Vigel v. *Hopp*, 104 U. S. 441.
United States v. *Trans-Missouri Ass'n*, 19 ~~C. C. A. 36-67.~~
Adams Equity, Sect. 21 and ~~361 note, 1528.~~

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The court below ought to have dismissed the bill for want of jurisdiction. It ought not to have entered a decree for the complainant.

Where the pleading is of a loose and inartificial character, so that the case is not well presented, as where a defendant is sued by using only the initial of his first name, or in the wrong district, there may be a waiver of a question which might have been fatal to the case, if it had been properly taken advantage of; but the question of the jurisdiction of a Federal Court, being one which goes to the power of the court to hear and determine the cause, cannot be waived. The jurisdiction of the courts of the United States must at all times depend on the fact that it is shown in the pleadings or evidence, and in the record in the Appellate Court.

Parker v. *Ormsby*, 141 U. S. 81-86.
Beals v. *Ills. M. & T. R.R. Co.*, 133 U. S. 290.
~~*No. Pacific R.R. Co.* v. *Walker*, 148 U. S. 391.~~

When the lack of jurisdiction appears in the pleadings the defect cannot be cured by amendment.

Crehore v. *Ohio & Miss. R.R. Co.*, 131 U. S. 240.

The objection to the lack of jurisdiction in a Federal Court may be made at any time and in any way, and the court ought to take cognizance of the defect whenever or however it is brought to its attention.

Parker v. *Ormsby*, 141 U. S. 81-87.
Deputron v. *Young*, 134 U. S. 241-251.
Bors v. *Preston*, 111 U. S. 252.

If this court find a lack of jurisdiction it can and should dismiss a case before it, although this defense has not been raised by counsel. Neither the parties nor their counsel can by their consent or negligence give jurisdiction to a court of the United States.

Mattingly v. *N. W. Virginia R.R.*, 158 U. S. 53-58.
Reynes v. *Dumont*, 130 U. S. 354-395.
Stevens v. *Nichols*, 130 U. S. 230.
Hipp v. *Babin*, 19 How. 278.
Rogers v. *Durant*, 106 U. S. 644.

CHAS. ALLEN TABER.

Counsel for Appellant.

The plea of the defendant (page 17 of record) called to the attention of the court and of the plaintiff the question of the want of jurisdiction on account of the citizenship of the plaintiff, or some one of the plaintiffs, and the defendant. A plea may show more than one reason why the court has no jurisdiction.

Daniels Ch. Pl. and Pr., Sects. 555–604–630.
Story Equity Pl., Sect. 657.

In some cases it has been held that the oath to a plea does not have the effect that the oath has to an answer: that of requiring the complainant to prove the allegation in his bill which the plea denies; but these decisions are all limited to pleas which are in the nature of a demurrer, raising the question on a matter of record in the court, or which can be decided by an inspection of the bill. These cases do not apply when the plea introduces a new matter not averred in the bill or on which evidence is needed.

Daniels Ch. Pl. and Pr., Sects. 627–628–686.

The rules as to pleading in equity are not so strict as those in law. Any form of words in a plea in equity which is sufficient to express the meaning and to present the question to be raised, has been allowed as sufficient.

Daniels Ch. Pl. and Pr., Sects. 362–363.
Adams Eq., Sect. 301.

The distinction between a plea in abatement and a plea in bar in equity is very narrow and difficult to draw, and many text writers and many courts have held that there is no practical line of distinction between them as to the effect in a cause in equity.

Daniels Ch. Pl. and Pr., Sects. 627, 843 and 942. Note 1.

Since the act of March 3, 1875, ch. 137, the Statutes have been very plain "that if, in any suit commenced in a circuit court, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, the said circuit court shall proceed no further therein, but shall dismiss the suit."

The case of Morris *v.* Gilmer, 129 U. S. 315, says: "The rule is inflexible and without exception, as was said in Mansfield *v.* Swan, 111 U. S. 379, 382, which requires this court, of its own motion, to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power it is called to act. This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relations to the parties to it . . . the above rule is equally applicable in a case in which the averment as to citizenship is sufficient, and such averment is shown in some appropriate mode to be untrue."

In Nashua Railroad *v.* Lowell Railroad, 136 U. S. 356, this court said, referring to the jurisdiction of the circuit court: "It is the duty of this court on appeal or writ of error to see that that jurisdiction has in no respect been imposed upon."

In Parker *v.* Ormsby, 141 U. S. 81–83, we find: "In the exercise of its power this court, of its own motion, must deny the jurisdiction of the courts of the United States, in all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act."

The case of Roberts *v.* Lewis, 144 U. S. 653–658, was an action at law from Nebraska. The petition set forth the divers citizenship of the parties. The answer was a general denial. There was no evidence as to the fact of citizenship. This court said: "The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, and like other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff. The record showing no proof or finding on this essential point, on which the jurisdiction of the circuit court depended, the judgment must be reversed, with costs, for want of jurisdiction in the circuit court."

In Mattingly *v.* N. W. Virginia Railroad, 158 U. S. 53–57, which was a suit in equity, the court said: "Although it does not appear that the question of jurisdiction was raised in the court below by any plea or motion, yet as the record failed to affirmatively show jurisdiction, this court must take notice of the defect (Roberts *v.* Lewis, 144 U. S. 653–658)."

164-701

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 139.

HENRY H. TUCKER, *Appellant*,

v.

GORDON McKAY, AS TRUSTEE, *Appellee*.

BRIEF FOR APPELLEE.

JAMES J. MYERS,
Of Counsel.

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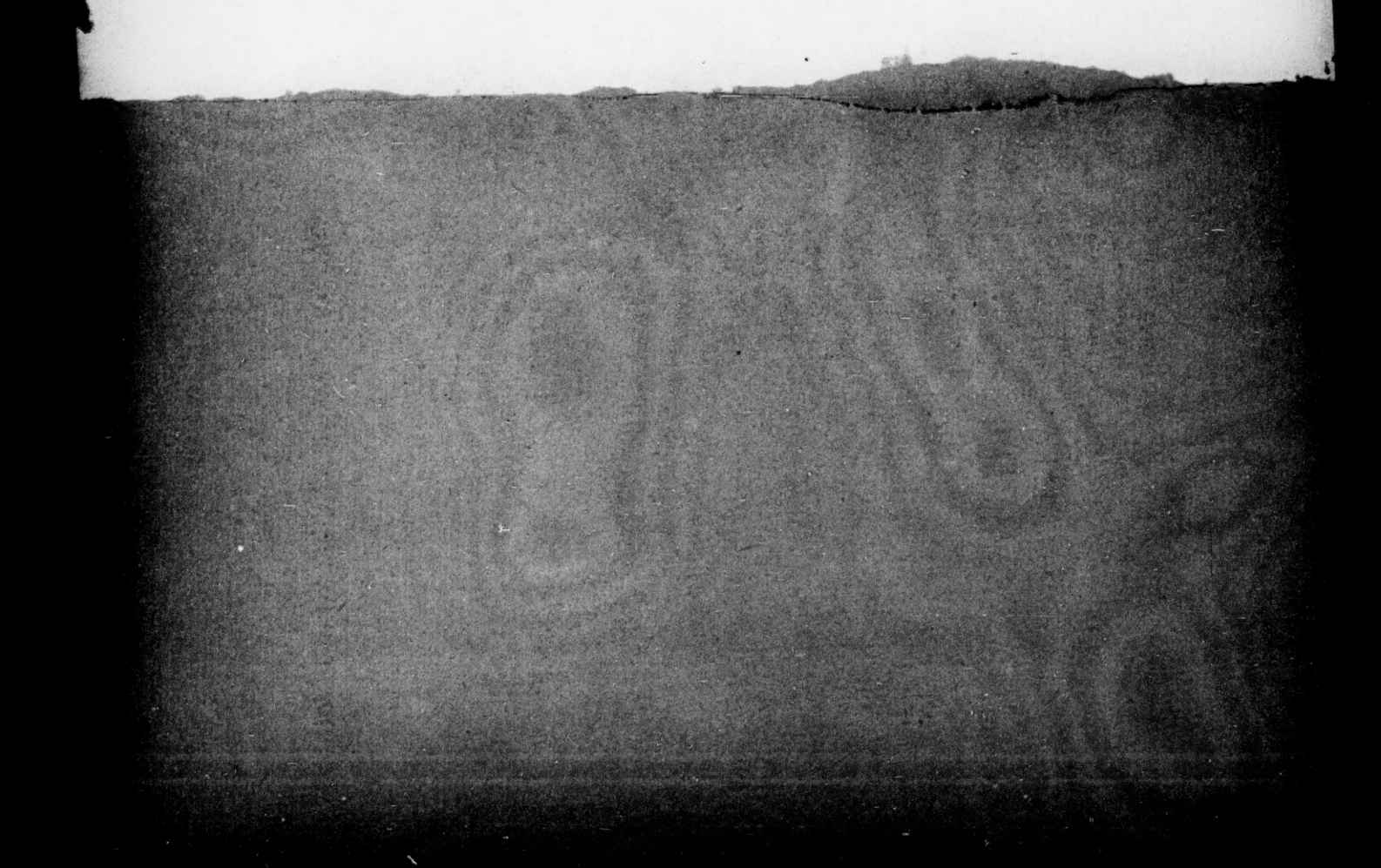

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 139.

HENRY H. TUCKER, *Appellant*,

v.

GORDON MCKAY, AS TRUSTEE, *Appellee*.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This case comes before this court on appeal from a final decree of the United States Circuit Court for the District of Massachusetts, sitting in Equity.

It is, like the case of Smith et al *vs.* McKay, No. 139 of the present term, a bill in equity by the plaintiff below (the appellee) as licensor, against the defendant below (the appellant) as licensee, and differs in no essential respect from that case, except in respect of the Plea of the Defendant, the amended Plea, the Special Replication of the Plaintiff thereto, the Petitions of Benjamin F. Moore and Enoch W. Mower to be joined as parties plaintiff in the cause, and the order overruling said Plea (Printed Record, pp. 17 to 25), and the additional error set forth in the Assignment of Errors (Printed Record, p. 32).

The questions covered by the brief, and argued in Smith et al *vs.* McKay, will not, therefore, be further considered

here; but this brief and argument will be confined to the additional points raised on the record in this case by reason of the defendant's Plea.

Attention should, however, be called to the fact that nowhere in the record in this case is there any mention or intimation of the certification to this court of any question, except that raised in Smith *vs.* Mckay — the want of jurisdiction of the Circuit Court. That is, the question raised by the plea seems to have been dropped or waived.

Whether the plea in this case is meant to be founded on the objection (I.) that the parties whom it is sought to have brought in, are *copartners* of the Trustee and should be brought in on that ground; or is founded on the objection (II.) that they are his *cestuis que trust* and should be brought in on that ground, it is difficult to say.

I.

Exactly what the plea as amended alleges, and all that it alleges, bearing on the first ground named above, is that — "the said McKay Sewing Machine Association is a voluntary association," and the plea then gives the names of some of the partners who compose the Association, and "who ought to be joined as parties complainant to this bill."

The cases upon which this allegation rests are — Hoadley *vs.* County Commissioners, 105 Mass., 519; and Gleason *vs.* McKay, 134 Mass., 419. Now, what these cases both decide is that the legal title to all the property of the McKay Sewing Machine Association is vested in Gordon McKay as trustee, the various shareholders at any given time being *inter sese* copartners (at least for the purposes of taxation). That is, the *cestuis que trust* for whom the trustee holds the legal title to all the property are *inter sese* copartners; but nowhere is there any intimation that the trustee, as trustee, is a

copartner with his own *cestuis*. He is the trustee of all, but he is (in his capacity as trustee) in no sense a copartner of any.

Whether Mr. McKay is or is not at any given time also a shareholder in the Association and is in that capacity a co-partner with the other *cestuis*, is entirely immaterial for the purposes of this case; for it is *in his capacity as trustee*, and only in that capacity, that this bill is brought.

He may at one time be a shareholder and at another not, and the fact that he is or is not a shareholder in no way alters the relations which he sustains, as such trustee, to his *cestuis*, nor his right to represent and act for them in accordance with the terms of his trust. He all times represents his *cestuis*, and sustains the same relations to them, entirely irrespective of his position as one of the beneficiaries under the trust, just as a trustee of the mortgage bonds of a railroad, for example, still holds the same relation to the other bondholders whether he does or does not own any of the bonds himself; or just as the trustee under a will holds the same relation to the beneficiaries named in the will, whether he himself is or is not a beneficiary under the will. And this the learned counsel seems to concede, for as a matter of fact it does not now appear from his plea, as amended in this case, whether Mr. McKay is or is not a shareholder, or was or was not a shareholder, when the bill was brought.

And, finally, on this point, it cannot be seriously contended that the mere fact, standing by itself, that the *cestuis* are *inter sese* copartners, though not copartners with the trustee, as trustee, renders it necessary to join them as parties. If they are required to be made parties at all, it must be by reason of their relation to the party who brings the suit, and not of their relations to each other.

II.

But if the plea be construed as resting on the second ground of objection stated above, namely, that the persons named therein should have been joined *because they are cestuis*, instead of on the ground already discussed, of their being copartners (either of the trustee or *inter sese*) the reasons against the plea are none the less conclusive.

1st. The rule that where the defect of parties appears on the face of the bill, it should properly be taken advantage of by demurrer, instead of by plea in abatement (which latter method is the proper way of raising the point when the defect does not appear on the face of the bill), is well settled.

Mitford on Pleading, 180.
Story's Equity Pleading, secs. 236, 237, 514.
Carey *vs.* Brown, 92 U. S., 171.
Mitchell *vs.* Lenox, 2 Paige, 230.
Merwin on Eq. and Eq. Pleading, §§ 964, 967.

In sec. 237 of Story, cited above, the rule is clearly laid down as follows: "The true course, therefore, is to take it (the objection to want of proper parties) by way of demurrer when it is apparent on the face of the bill, or if not apparent, by plea or by answer."

Now, in the case before the Court, the alleged defect, if it is a defect, is clearly apparent on the face of the bill: for the bill distinctly shows upon its face that, besides Gordon McKay, the trustee, who brings the bill, there is a *cestui que trust*, *viz.*, the McKay Sewing Machine Association, which is not made a party to the bill. The exception in this case should therefore have been taken by demurrer.

2d. But, waiving any further discussion as to the method adopted for raising the question of the alleged defect of parties by reason of the non-joinder of the *cestuis* in this case, and treat-

ing the question as properly before the court (the special replication which the plea made necessary having been filed by leave of court, and the facts alleged in it having been admitted by the respondent at the hearing), the authorities are overwhelming that there is no defect of parties in this case.

To the general rule that in a suit in equity all persons having an interest in the subject matter of the suit should be before the court, there is no exception better established than the one that when, in a suit respecting trust property, the *cestuis* are virtually represented by the trustee, who is merely seeking to reduce the trust property to possession, there being no adverse interests to be litigated in the case between him and the *cestuis*, the *cestuis* are not necessary parties to the suit.

The rule governing this question in the United States Court is well stated in Carey *vs.* Brown, 92 U. S., p. 172, in which the court said (Mr. Justice Swayne delivering the opinion):

"It is insisted that the bill is fatally defective for want of parties. It alleges that the complainant was the owner and holder of the promissory notes which lie at the foundation of the case. In his testimony he says he held the legal title to them, and that they were delivered to him by their respective owners, with power to settle and dispose of them at his discretion, and with no condition imposed but the implied one that he should account for the proceeds to those from whom he received them. The transfer created a trust. Those who transferred them were the *cestuis que trust*, and Brown was the trustee.

"The general rule is, that in suits respecting the trust property, the *cestuis que trust* as well as the trustees are necessary parties. (Story's Eq. Pl. sec. 207.) To this rule there are several exceptions. One of them is, that where the suit is brought by the trustee to recover the trust property, or to reduce it to possession, and in no wise affects his relation with his *cestuis que trust*, it is unnecessary to make the latter

parties. Horsley *vs.* Fawcett, 11 Beav., 569, was a case of this kind. The objection here was taken there. The Master of the Rolls said: 'If the object of the bill were to recover the fund with a view to its administration by the court, the parties interested must be represented. But it merely seeks to recover the trust-moneys, so as to enable the trustee hereafter to distribute them agreeably to the trusts declared. It is therefore unnecessary to bring before the court the parties beneficially interested.' Such is now the settled rule of equity pleading and practice."

Another case to the same effect and in the same court is Kerrison *vs.* Stewart *et al.*, 93 U. S. 155. In that case the bill was brought by an assignee in bankruptcy to adjust the liens upon the property of the bankrupts. The bankrupts had previously made a voluntary assignment to the plaintiff Kerrison for the benefit of creditors, and that assignment had been adjudged void as against the present defendants, Stewart *et al.*, who had recovered judgment and claimed to hold the assigned property for their debt. The creditors now claimed that they were not bound by the judgment against Kerrison as assignee under the voluntary assignment, because they were not parties to the first suit between him and Stewart *et al.*

In its opinion, delivered by Mr. Chief Justice Waite, the court said:

"It cannot be doubted that, under some circumstances, a trustee may represent his beneficiaries in all things relating to their common interest in the trust property. . . . If he has been made such a representative, it is well settled that his beneficiaries are not necessary parties to a suit by him against a stranger to enforce the trust. . . . In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party."

"The principle which underlies this rule has always been applied in proceedings relating to railway mortgages, where a trustee holds the security for the benefit of bondholders. It is not, as seems to be supposed by the counsel for the appellants, a new principle developed by the necessities of that class of cases, but an old one, long in use under analogous circumstances, and found to be well adapted to the protection of the rights of those interested in such securities, without subjecting litigants to unnecessary inconvenience."

* * * * * *

"It remains to determine whether Charles Kerrison was authorized to represent the creditors in proceedings against him to defeat the title he held for their security. This depends upon the intention of the parties, as expressed in the deed creating the trust and making him the trustee." . . .

"From this it appears that he was not only invested with the legal title to the property, but that all parties relied upon his judgment and discretion for the protection of their respective interests. A clear intent is manifested of relieving the creditors from the necessity of looking personally to the conversion of the securities, or to the preservation of the trust. While the trustee is nowhere in express terms invested with the power to give receipts for purchase-money upon sales made, it is perfectly apparent that such must have been the intention of the parties. The wide range of discretion allowed him in making the security available for the payment of the debts is entirely inconsistent with the idea that purchasers or mortgagees must look to the application of their moneys after payment actually made to him. The creditors cannot interfere with his discretion in making sales, so long as he keeps within the general scope of his powers; neither can they prescribe the terms upon which he shall sell. In all these particulars he has been authorized to act in such manner as he shall deem best for the interests of both parties,

debtors as well as creditors. The debtors rely upon his judgment to avoid unnecessary sacrifice; and the creditors must be satisfied, if, at the proper time, he is found to have done all that could reasonably be required of him to subject the securities to the payment of their several demands."

"With these facts before us, it is impossible to come to any other conclusion than that, as to strangers, he did represent the trust and its property. Purchasers must go to him to make their purchases, and adverse claimants may properly look to him as the party against whom alone they are called upon to assert their rights." . . .

"There is no need of inquiring whether this was a case in which one of the creditors might be brought in and made to represent all; for the trustee is himself the chosen representative of all, and whatever binds him must bind them."

In Shaw *vs.* Railroad Co. (100 U. S. 606) which arose on a bill of review filed by the plaintiff Shaw, one of the bondholders, who sought to avoid what the trustees of the bondholders had previously done in the foreclosure of the mortgage on the railroad, the court held that the bondholders, though not parties to the foreclosure proceeding, were bound by what the trustees had done.

And the same rule prevails in the Massachusetts courts as in the courts of the United States.

In Shaw *et al. vs.* Norfolk Co. R. R. Co. (5 Gray, 162), the bill was brought by the trustees to foreclose a railroad mortgage for the benefit of bondholders. Demurrer because bondholders were not made parties. Opinion by Bigelow, J., p. 170:

"The rule of equity pleading, that all persons interested in the subject matter of the suit, and whose rights may be affected by a final decree, must be made parties to the bill, is subject to several exceptions, which are as well established as the rule itself.

"Whenever the parties interested are very numerous, so that it would be difficult or impracticable to bring them all before the court, and the different interests involved in the suit may be fairly and fully represented and tried without joining them, a strict adherence to the general rule is not required. This is true in all cases in which certain parties to a suit are entitled to be deemed the full representatives of the legal and equitable rights of many persons, so as to bind their interests under the decree, although they are not and cannot be made parties." . . . (Decisions quoted.)

"The case at bar clearly comes within the principles on which these decisions rest. The bondholders for whose benefit the mortgage set out in the bill was made, are very numerous; and the bonds being assignable, it would be very difficult, if not wholly impracticable, to ascertain with accuracy, at any given time, who were the owners of them, so as to make them all parties to a suit in equity. Nor is it necessary that any of them should be joined to represent their own rights and interests and those of the other *cestuis que trusts* under the indenture. The main purpose of the instrument was to vest the property in trustees, with full power and authority to act as representatives of the *cestuis que trust* in all things relating to their common rights and interests. The sole object of the bill is to secure and protect these rights and interests. The trustees have no adverse claims against their *cestuis que trust.* On the contrary, they only seek, as the representatives of the bondholders, to enforce the trusts created for their benefit, and in which they all have a common interest. It is sufficient, therefore, that the court have before them those who are the full representatives of the parties beneficially interested in the property, so that those interested will be bound by the decree." Demurrer overruled.

Ashton *vs.* Atlantic Bank (3 Allen, 217) was a case of a

bill in equity to compel the delivery to a trustee of certain trust property pledged by a former trustee as collateral security for money lent by them to him on his private account. Demurrer for non-rejoinder of *cestuis* as parties plaintiff. In the opinion (p. 219–20) the court said:

"As to the omission to join in the bill the *cestuis que trust*, this was not necessary in the present case. The trustee has no adverse claims against the *cestuis que trust*, the object of this bill being more effectually to secure their interest. The trustee fully represents them, and has full power to enforce this claim. The case does not fall within the general rule in equity that in suits by or against the trustee the *cestuis que trust* must be made parties."

Boyden *vs.* Partridge (2 Gray, 190) was a case of a bill by trustee to redeem a mortgage made by himself. Demurrer. In the opinion (p. 194) the court said:

"It is undoubtedly a general rule, that in suits respecting trust property, brought either by or against trustees, the *cestuis que trust* are necessary parties. But that rule does not require, if indeed it is applicable at all to the present proceeding, that he (*cestui*) should be made a party to the bill. The whole legal estate is in Boyden (plff.). He is the mortgagor and has made no transfer of his interest or title. No other person has in law any right of redemption; and a decree against him must be conclusive in favor of the defendants against all parties claiming through or under him or in his behalf. Nor does the inquiry concerning the right to redeem involve the necessity or afford an occasion of investigating the relations subsisting between the trustee and *cestui que trust*. Their respective claims and obligations will remain the same, whatever may be the termination of this suit. And although it may be very beneficial and even indispensable in the former to redeem the estate, in order that he may be able fully to execute the trust he professes

to have assumed, it is quite immaterial to the defendants what may be the consequences of his failure to do so. It is sufficient for them, in reference to the particular question before us, that with those consequences they have no concern or connection; but that upon making a successful defence to the present suit, the title of Wm. B. Partridge (deft.) to the whole estate, will be legally and conclusively established. It was unnecessary for the protection of any one, or the furtherance of any right, that Mowry should have been made a party to the bill.

And the rule elsewhere is the same.

Adams *v.* Bradley (12 Mich. 346) was a case of a bill to foreclose a mortgage. Plaintiff was a member of a firm consisting of three persons. These three once owned the land in question, one undivided third each. They joined in a conveyance to the defendant, and a mortgage back to secure the purchase money was made to plaintiff alone. The bill was dismissed below because the other two partners were not made parties plaintiff. On appeal, the court said (p. 350):

"This bill is filed to collect a debt, and not to settle the rights of *cestui que trusts* in its proceeds. No controversy can arise here between Adams (plff.) and his late partners. It has always been settled as the rule in this State, that, in a suit by a trustee to reduce the trust fund into his possession, the beneficiaries need not be brought in.

Sill *vs.* Ketchum (Harrington's Ch. (Mich.) 423) was another case of a bill by a trustee to forclose a mortgage. Demurrer for want of parties plaintiff. Demurrer overruled. The court said:

"What is the object of the present bill? It is merely to get in money due upon the mortgage in part execution of the trust. The rights of the *cestuis que trust* are not brought in question in this proceeding. There are no rights of these

persons put in issue. . . . This litigation cannot be aided or varied by making the *cestuis que trust* parties. The decision would be the same upon the validity or the amount due upon the mortgage in either case. The right of the persons for whom this trustee acts cannot be affected by the collection of the money. Their right to the proceeds in the hands of the trustee remains.

In Morey *vs.* Forsyth (Walker's Ch. (Mich.) 465) the plaintiff as assignee of a judgment files a judgment creditors' bill against debtor. Objected that plaintiff was a trustee, and that *cestui* was not joined as party plaintiff. The court said: "Complainant may be regarded as a trustee of that part of the judgment, *viz.*, two hundred dollars to be paid to the bank when the judgment is collected. The bill is filed to enforce payment of the judgment; not in execution of the trust. It is no part of its object to effect the existence of the trust, or the trust property, except to place it in the hands of the trustee, who cannot, until then, execute the trust. Payment of the judgment only, and not the existence, effect, or execution of the trust, is the prayer of the bill. The *cestui que trust*, the bank, is, therefore, not a necessary party; (citing 3 Ves. 15; 3 P. Wms. 32; Calvert on Parties, 212–13).

Horsley *vs.* Fawcett (II Beav, 565) was a case of a bill by trustee to recover trust moneys wrongfully misappropriated by defts. Objection for want of joining *cestuis* as plaintiffs.

Master of Rolls: "If the object of this bill were to recover the fund, with a view to its administration by the court, the parties beneficially interested must be represented. But it merely seeks to recover the trust moneys, so as to enable the trustee hereafter to distribute them conformably with the trusts declared. It is therefore unnecessary to bring before the court the parties beneficially interested."

See, also, Potts *vs.* Thames Haven Dock Co., 7 Eng. Law and Eq. 262.

Stace *vs.* Gage, 8 Ch. Div. 451.
Ferguson *vs.* Aplenhite, 10 Sm. & M., 301.
Story's Eq. Pl. secs. 142, 143, 150, and 184.

In Calvert Parties in Equity (2nd ed.) 277, the learned author says:

"It will be observed, that Lord Eldon says in Adams *vs.* St. Leger (I, B. & B. 182), that in most cases respecting trust property, the *cestuis que trust* should be made parties. The expression naturally suggests an inquiry in what cases they are not to be made parties. There are some cases in which the existence or enjoyment of the property is affected by the prayer of the suit. There are others in which the existence of the property is not affected, and the only object is to transfer it into the hands of the trustees. These two classes must not be confounded together. In cases of the former class the interest of the *cestui que trust* is immediately affected by the proceedings: not so in cases of the latter class, for they will not lose their lien upon the property, even if the trustee fails to reduce it into possession. The duty of the trustee is to reduce it into possession, that he may have the complete execution of the trust within his own power. With the discharge of this duty the *cestuis que trust* have nothing to do, although he may compel his trustee to undertake it. It seems that when the prayer of the bill is confined to the one object of reducing the trust property into possession, the *cestuis que trust* ought not to be made parties."

And especially is it true that the *cestuis* need not be made parties to a bill by or against their trustee when the trustee has been constituted as such by the consent and with the approval of the *cestuis* for the express purpose of representing them and acting for them, and relieving them from the necessity of joining in the management of the trust property.

In Bifield *vs.* Taylor, I Beatty (Ir. Ch.) 91) — the Chancellor said:

"There is no doubt of the general principle in equity that a trustee cannot institute a suit, without his *cestuis que trusts* being parties to it. In ordinary cases this is a salutary rule, but a rule subject to be modified according to circumstances: for there are cases where the legal title is vested in the trustee, for the express purpose of enabling him to execute all the duties attached to the trust, without the intervention of the *cestuis que trusts*. In mercantile transactions, it is very common to vest the legal rights in a few individuals, who are thereby authorized to act for all persons interested: and it has not in such cases been considered necessary to have any of the *cestuis que trust* made parties to any of the proceedings in this court, where it was the manifest object to exclude from the suit a multitude of parties. . . . When it appears on the face of the contract, that it was the intention of the parties to exclude the *cestuis que trusts* from the necessity of taking any part in the transactions relating to the management of the trusts, a court of Equity will dispense with their being made parties to the suit."

And in Story Eq. Pl. sec. 143, the learned author, referring to the case of Van Vechten *vs.* Terry, 2 John's Ch. 197, says: "Thus, for example, where real estate had been purchased by a joint fund, raised by subscription, in shares of more than two hundred and fifty subscribers; and the property had been conveyed to certain persons as trustees, for the subscribers, and afterwards a bill was brought against the trustees for a sale of the real estate under a mortgage made in pursuance of the trust, it was held not necessary for the subscribers to be made parties to the bill; for the trustees, by the very nature and constitution of such a trust, must be held sufficiently to represent the interests of all the subscribers; and a different doctrine

would be attended with intolerable hardship and inconvenience, as it might be impossible to make all the subscribers parties."

And for a case very much in point, where trustees held property to manage and control as Mr. McKay, the trustee, holds it in the case before the court, see Taylor *vs.* Rockafeller, 18 Am. Law Reg. (N. S.) p. 298. That case was argued in the U. S. Circuit Court for the Western District of Pennsylvania, and the language of the opinion of the court, delivered by Mr. Justice Story, fully meets and covers our case. (See pp. 308–310, inclusive.)

See, also, Williamson *vs.* N. J. Southern R. R. Co., 25 N. J., Eq. 13.
Humphreys *vs.* Hollis, Jacobs (Eng. Ch.) 73.

That it was the express intention of all parties that Mr. McKay should in all matters represent the *cestuis* and carry on the business in his own name, the Declaration of Trust (Printed Record, pp. 19–23), taken in connection with the agreement signed by all those who were interested in the trust at the time the Declaration of Trust was executed, leaves no room for doubt.

A portion of the language of the recital of the Declaration of Trust is as follows: "And whereas it is deemed advisable and for the advantage of all parties in interest that the said patents, inventions, and business should continue to stand in my (McKay's) name, and all business thereunder be done as heretofore," that is, in Mr. McKay's name and by him.

And in the first clause of said Declaration of Trust it is provided as follows: "All the persons having an interest in the property aforesaid, and in the profits and beneficial results of the business done under and with the same, and accepting this certificate and declaration of trust as the evidence of their title to such interest, shall constitute and be an association,

which shall be called and known as the 'McKay Sewing Machine Association,' but no member of the Association or party in interest in its property or business shall have any right or authority whatever to make any contract or bargain, or receive any money, or transact any business whatever, in behalf of or binding on the Association, or any member thereof, except as he shall be specially authorized by or under the provisions of this declaration of trust."

And then, to make the case more clear, the certificate issued to and accepted by each shareholder distinctly provides that he shall hold his interest "subject to all the conditions and restrictions set forth in the Declaration of Trust."

The cases cited by the counsel for the defendant at the hearing in the Circuit Court, and which probably will be relied upon before this court, upon the question of the necessity of bringing in the shareholders in this case, for the reason that they are *cestuis*, are merely authorities in support of the well-known general rule that all parties in interest must be before the court; but they do not in the least raise any question as to the soundness of, or limit the application of, the exception to that general rule, which exception the many cases above cited so fully establish, and which rests upon the ground that the *cestuis* in such cases *are virtually before the court in the person of their trustee, who represents them for all the purposes of the litigation.*

This appeal should be dismissed with costs.

JAMES J. MYERS,
Of Counsel.

164-701

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OCTOBER TERM, 1896.

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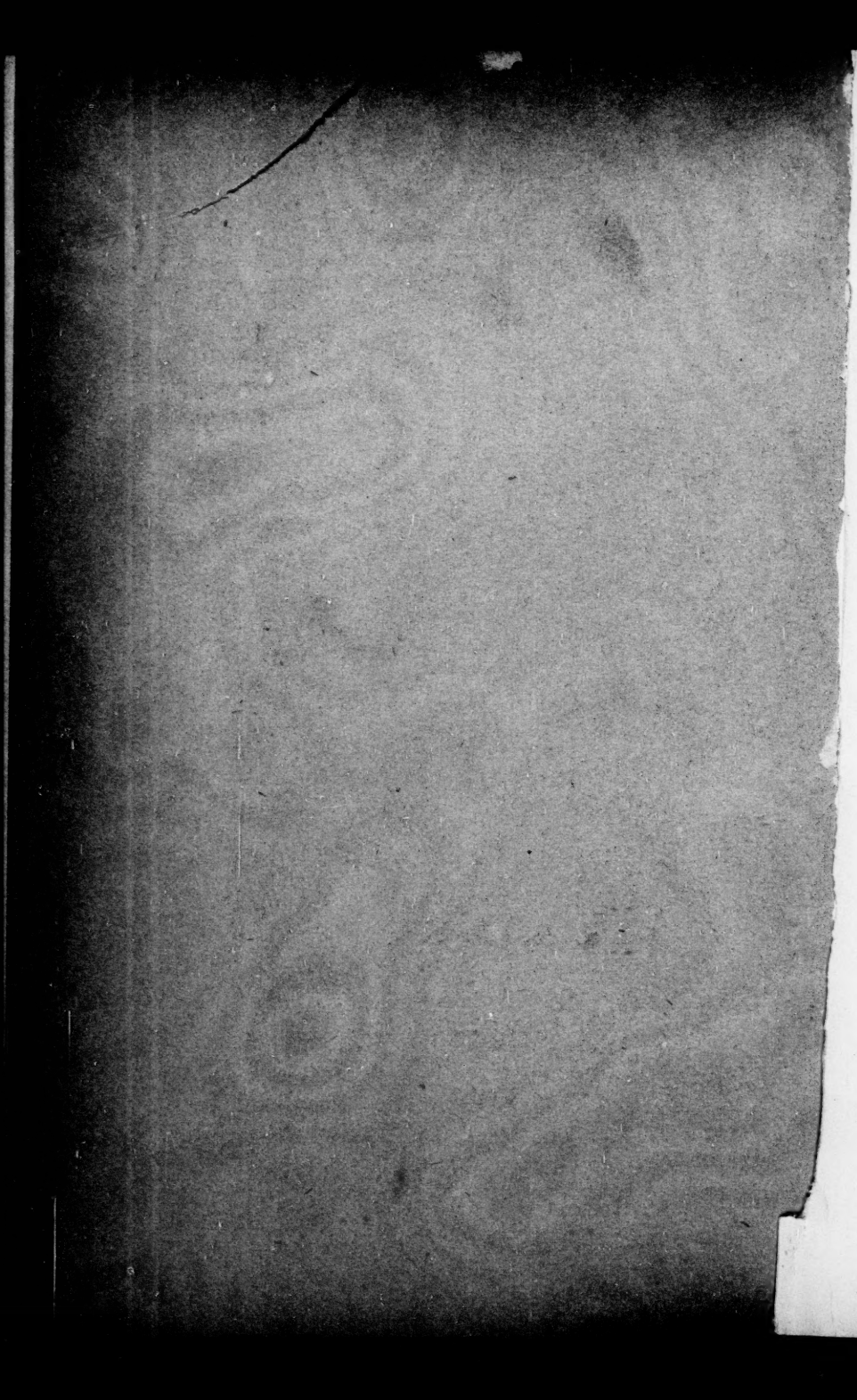

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This case comes before this court on appeal from a final decree of the United States Circuit Court for the District of Massachusetts, sitting in Equity.

It is, like the case of Smith et al *vs.* McKay, No. 83 of the October term of 1895, reported in *161, U. S. 355*, a bill in equity by the plaintiff below (the appellee) as licensor, against the defendant below (the appellant) as licensee, and presents no question not fully covered by the decision in that case, except only, (I) the question raised by the plea found on page 17 of the record, setting up "the lack of the proper parties," and, (II) that raised by the answer, near the top of page 26 of the record, as to the citizenship of the complainant.

I.

The Question raised by the Plea.

(*a*) The gist of this plea, it will be seen, is that the McKay Sewing Machine Association for which Gordon McKay, the trustee, brings the bill, is in reality a copartnership composed of several *cestuis que trustent*, including the trustee himself, all of whom "other than said Gordon McKay" are citizens of Massachusetts, and ought to be joined as parties complainant to the bill. "Wherefore," as these *cestuis* are not joined the defendants "pleads lack of proper parties."

That Gordon McKay is a citizen of Massachusetts, the plea does not in any way allege and by no reasonable construction can its language be tortured into such an allegation. On the contrary, he is, by the words "other than said Gordon McKay," expressly excepted from among those who are alleged to be citizens of Massachusetts.

But what of it, even if these *cestuis* who compose the McKay Sewing Machine Association are *inter sese* copartners? That fact surely has no bearing on the question whether they are entitled to be joined in a suit brought by their trustee in their behalf.

The question here sought to be raised is not then, primarily one as to the jurisdiction of the Circuit Court, but it is one of parties and such the defendant expressly made it by the language of the final paragraph of his plea. Is it, or is not, necessary to join the *cestuis* in view of the relations of the trustee to them and to the trust property? That is the question intended to be presented by the plea and that question is not one on which there is any right of appeal to this Court.

When that shall be decided, then, if the *cestuis* are brought in, may come the further question of fact, whether any of the parties whom it has been found necessary to join, are citizens of Massachusetts, but not before.

(*b*) But even if an appeal be allowed, and this court go fully into the question, sought to be raised by this plea, the result must be the same.

The cases upon which the defendants' counsel based this claim of copartnership between the members of the McKay Association undoubtedly are, Hoadley *vs.* County Commissioners, 105 Mass., 519, and Gleason *vs.* McKay, 134 Mass., 419, though the plea does not set forth as it should do, or at all, the facts necessary to enable the court to pass upon the question sought to be raised.

Now, what both these cases decide is that the legal title to all the property of the McKay Sewing Machine Association is vested in Gordon McKay as trustee, the various shareholders at any given time being *inter sese* copartners (at least for the purposes of taxation). That is, the *cestuis* for whom the trustee holds the legal title to all the property, are, *inter sese*, copartners; but nowhere is there any intimation that the trustee, as trustee, is a copartner with his own *cestuis*. He is the trustee of all, but he is (in his capacity as trustee) in no sense a copartner of any.

Whether Mr. McKay is or is not, at any given time, also a shareholder in the Association and is in that capacity a copartner with the other *cestuis*, is entirely immaterial for the purposes of this case; for it is *in his capacity as trustee*, and only in that capacity, that this bill is brought.

He may at one time be a shareholder and at another not, and the fact that he is or is not a shareholder in no way alters the relations which he sustains, as such trustee, to his *cestuis*, nor his right to represent and act for them in accordance with the terms of his trust. He all times represents his *cestuis*, and sustains the same relations to them, entirely irrespective of his position as one of the beneficiaries under the trust, just as a trustee of the mortgage bonds of a railroad, for example, still holds the same relation to the other bondholders whether he does or does not own any of the bonds himself; or just as the trustee under a will holds the same relation to the beneficiaries

named in the will, whether he himself is or is not a beneficiary under the will.

And this the learned counsel seems to concede, for as a matter of fact it does not appear from his plea, in this case, whether Mr. McKay is or is not a shareholder, or was or was not a shareholder, when the bill was brought.

Finally, on this point, it cannot be seriously contended that the mere fact, standing by itself, that *cestuis que trustent* are, *inter sese*, copartners, though not copartners with the trustee, as trustee, renders it necessary in all cases to join them as parties in a suit by the trustee in their behalf. If they are required to be made parties at all, it must be by reason of their relation to the trustee who brings the suit, and not of their relations to each other.

In this case therefore, the plea, in order to enable the court to pass upon the question sought to be raised, should have set forth the facts required to show that in point of fact the relation of the *cestuis* to the trustee was such as to render them necessary parties to the suit. This, the plea entirely failed to do, and the correct practice would, no doubt, have been for the complainant to set the case down for hearing on the sufficiency of the plea which was unquestionably bad.

Instead of doing this however, the complainant, to whom alone all the facts regarding his relations to the trust property and to his *cestuis* were known, resorted to the irregular course of himself setting forth all those facts, and then the defendant and court acquiescing in this action, the case was duly heard and the plea overruled.

This decision, whatever view be taken as to the admission of the facts shown in the so-called Special Replication, was unquestionably right. Standing alone, by itself the plea is clearly bad. If on the other hand the facts set up in the "Special Replication" be treated as a part of the allegations of the plea and admitted into the record the plea is no less bad as the many authorities presented on pages 5 to 16 inclusive of the brief heretofore filled in this case conclusively show.

II.

The Citizenship of the Complainant.

That the bill sufficiently alleges the citizenship of Gordon McKay, as of the State of Rhode Island, is clear (record p. 1). This allegation the defendant meets with a specific denial in the answer (record p. 26), thereby putting that fact, as the answer does many other allegations of the bill, in issue.

But certainly this mere denial in the answer, that the plaintiff was a citizen of Rhode Island, did not establish as a fact that he was not such and thereby defeat the jurisdiction of the court in this case. It raised a question of fact to be tried like any other question of fact when the case should finally come on for trial. And when the case did finally come on for trial on the pleadings and evidence, that question of fact — the citizenship of Gordon McKay — was, it must be assumed, tried like every other question of fact. The decree is in the nature of a general finding and is to be taken as covering all material questions of fact as found in the plaintiff's favor. The issue to the citizenship of Gordon McKay, no less than every other material question of fact raised by the pleadings and necessary to maintain the plaintiff's case, must be taken to have been found in his favor under the language of the decree, (page 30), in order to have authorized the Court to enter that decree. The language is as follows: — "This cause came on to be heard at the October Term, to wit, February 21st, 1890, upon the pleadings and proofs and in the presence of counsel for the respective parties, and now upon consideration thereof, it is ordered, adjudged and decreed," etc. Here follows a decree holding the license to have been in full force, ordering an account, and referring the case to a master; and later, and upon the coming in of the master's report, this was followed by a final decree.

To distinguish this case entirely from the case of Roberts *vs.* Lewis, 144 U. S. 653, cited in the defendants' brief, it is only necessary to call attention to the fact that that was a case of a *special verdict*, and there being no special finding on the question of citizenship the court held the citizenship not proved. In our case the Circuit Court could not properly have entered its decree until it had found the fact of citizenship as alleged in the complainant's bill.

The appeal from the Circuit Court should be dismissed with costs.

JAMES J. MYERS.
Of Counsel.